

1-1972

Prison Mail Censorship: A Nonconstitutional Analysis

Michael L. Stern

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Michael L. Stern, *Prison Mail Censorship: A Nonconstitutional Analysis*, 23 HASTINGS L.J. 995 (1972).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol23/iss4/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Prison Mail Censorship: A Nonconstitutional Analysis

By MICHAEL L. STERN*

Corrections remains a world almost unknown to law-abiding citizens, and even those within it often know only their own particular corner.¹

A stereotypic view of our prisons long held by the American public characterizes these institutions as walled fortresses the purpose of which is to protect society by segregating convicted wrongdoers from the general population and to punish them for their evil conduct by work at hard labor.² The American public naively assumes that by removing the prisoner from society the underlying social problems will disappear.³

To counter this attitude, modern correctional theories have stressed rehabilitation of the prisoner through education, vocational training, and recreation. Nevertheless, high rates of recidivism and violent disturbances within prisons indicate that the present combination of theory and practice has failed to provide an environment conducive to rehabilitation. In fact, recent experience shows that some penal institutions have made no progress towards establishing conditions that contribute to the rehabilitation of prisoners.⁴ Where prisoner resent-

* A.B., 1967, Stanford University; J.D., 1971 Harvard University. Associate-in-Law, University of California, Berkeley. The author wishes to express his gratitude to Professor Bruce Jacob of Ohio State University whose constructive criticism proved invaluable in the preparation of this article.

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 1 (1967).

2. The prototypes of contemporary penal institutions were founded in the late 18th and early 19th century period of liberal reform. They were intended to be a humane alternative to traditional corporal punishment. By the middle of the 20th century their main purposes remained custody, punishment, and hard labor. S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 31-36 (1963).

3. P. SLATER, *THE PURSUIT OF LONELINESS* 15 (1970).

4. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). See also Teeters, *State of Prisons in the United States: 1870-1970*, 33 *FED. PROBATION* (Dec. 1969) at 18, 19: "[T]he story [in every state] is the same. Brutality, regimentation, despair (experienced both by inmates and staff), lack of funds, political interference (com-

ment against such conditions has reached the boiling point, riots and strikes have quickly erupted. While such disturbances are not new to prisons, their present intensity demonstrates that inmates are beginning to regard prison insurrection as a valid means of political protest.⁵ Inmate grievances include, among others, the unresponsive attitude of some administrators to what are considered legitimate claims concerning living conditions, classification, disciplinary and parole procedures, and an inability to communicate complaints to the outside. Thus, it is not surprising that prisoners make the following assertion:

[When a] work-stoppage or general strike occurs in prison, the papers print only such information as is released from prison authorities—even the so-called inmate source of information is related through prison authorities The information is almost always highly distorted. The inmates themselves may not speak directly or offer mitigation.⁶

Therefore, while correctional theory and practice have certainly evolved away from the old concept of the prisoner as the "slave of the State,"⁷ they have not necessarily moved in the direction of bestowing any significant degree of liberty or rights upon those confined in penal institutions.⁸ In fact, the oft-quoted judicial declaration, "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or

missioners picked through politics rather than through experience and continued in office despite pedestrian performance), poor physical conditions, wholesale homosexuality attacks . . . and many other unwholesome conditions that exist almost everywhere. Indeed, the prison presents an abysmal graveyard of blighted expectations which shows little promise of improvement despite the heroics of correctional personnel, enlightened lay citizens, understanding legislators and organizations and societies dedicated to reform."

5. The inmates at San Quentin, California instituted a strike in January, 1968, and subsequently presented a list and report of grievances to the California Assembly Criminal Procedures Committee. Their report is reprinted in *INSIDE: PRISON* AMERICAN STYLE 202-325 (R. Minton ed. 1971).

6. *Id.* at 270.

7. This attitude was expressed by a Virginia court in 1871, in denying application of the Virginia Bill of Rights to felons: "A convicted felon [is one] whom the law in its humanity punishes by confinement in the penitentiary instead of with death For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795-96 (1871).

8. A felony conviction results in the permanent loss of the right to vote in 39 states, the right to hold public office in 27 states, and the right to serve on a jury in 12 states; it is a ground for divorce in 36 states; in some states felons are deprived of the capacity to testify or to enter contracts and receive or transfer property. *AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS* 271-72 (3d ed. 1966).

by necessary implication, taken from him by law,"⁹ has had little meaning in application.

In recent years inmates have increasingly sought to bring their complaints to the attention of their immediate families, their friends, the courts, and the public. Frequently these attempts to communicate with the outside world have come into direct conflict with the rules and regulations written and enforced by the very persons about whom the inmates are complaining. One former inmate has described the tedious procedures and frustrations which prisoners must surmount in seeking help or contact beyond the high walls of captivity:

The opportunities for a prisoner to maintain his contacts with the outside world . . . consist of his writing privilege and his visiting privilege. The rules governing these privileges vary widely from institution to institution. But, in general, they are very restrictive. In most prisons, a man, upon admittance, is required to list the people with whom he will correspond, and from whom he will receive visits. In most institutions the number he is permitted to list is small—four to six. In others, the correspondents and visitors must be close relatives.

The frequency with which letters may be written also varies greatly from institution to institution. In some, the prisoner is permitted one letter a month, in others, one every two weeks, in still others, one every week. The letters are strictly censored; any sort of comment about the institution or its personnel is prohibited. In some institutions, the censorship rules are so rigorous that it is virtually impossible to comment on anything but the state of one's health (and there must be no complaints!) and the weather.¹⁰

The broad authority exercised by prison officials, free from judicial intervention, has traditionally been based upon statutory delegations of power¹¹ or claims of administrative expertise in the manage-

9. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

10. Leopold, *What is Wrong with the Prison System?* in *THE TASKS OF PEN-
OLOGY* 38 (H. Perlman & J. Allington ed. 1969).

11. The Federal Bureau of Prisons, under the direction of the Attorney General, has authority to provide for the discipline of federal prisoners. 18 U.S.C. §§ 4001, 4042 (1964). Among the state statutes giving broad discretionary authority to directors of the various prisons are: ARK. STAT. ANN. § 46-118 (Supp. 1971); CONN. GEN. STAT. ANN. § 18-81 (Supp. 1971-1972); FLA. STAT. ANN. § 944.14 (Supp. 1971-1972); GA. CODE ANN. § 77-307 (1964); IDAHO CODE ANN. § 20-244 (1948); IND. STAT. ANN. § 13-239 (1956); KY. REV. STAT. ANN. § 197.020 (1969); LA. REV. STAT. ANN. § 15-829 (Supp. 1971); MASS. GEN. LAWS ch. 124, § 1 (1958); MISS. CODE ANN. § 7932 (Supp. 1971); NEV. REV. STAT. § 209-070 (1967); N.Y. CORREC. LAW § 46 (McKinney 1968); N.C. GEN. STAT. §§ 148-11 (Supp. 1971); OHIO REV. CODE ANN. § 5145.03 (Page 1970); ORE. REV. STAT. § 421.016 (1971); PA. STAT. tit. 61, § 350 (1964); S.C. CODE § 55-303 (1962); UTAH CODE ANN. § 64-9-2 (1967); W. VA. CODE ANN. § 28-5-3 (1971).

ment of penal institutions.¹² Despite past determinations that the rights of prisoners were to be generally left to the administrative discretion of these authorities,¹³ some courts have recently begun to consider the right of prisoners to communicate with the outside world through use of the mails and, in doing so, have begun to place limits on the power of prison administrators.

The purpose of this article will be to analyze past and present judicial decisions concerning the rights of prisoners to use the mails as a vehicle of free expression. Rather than focusing upon the constitutional issues arising out of prison censorship of mails,¹⁴ an effort will be made to define the relationship between regulation of inmate correspondence and the ability of correctional authorities to carry out the objectives of the penal system.¹⁵ Further, the suggestion will be made that freer contacts with the outside world may eventually lead to better prison conditions and greater possibilities for inmate rehabilitation.

I. The "Hands-Off" Doctrine and Prisoners' Rights

The traditional judicial basis for allowing wide grants of administrative discretion to correctional administrators was the belief that the courts were without power to supervise prison administration or interfere with the ordinary rules and regulations of penal institutions.¹⁶ This policy of judicial abstinence has been termed the "hands-off" doc-

12. One court has stated that the "supervision of inmates of . . . institutions rests with the proper administrative authorities and . . . courts have no power to supervise the management and disciplinary rules of such institutions." *Sutton v. Settle*, 302 F.2d 286, 288 (8th Cir. 1962).

13. See Tappan, *The Legal Rights of Prisoners*, 293 ANNALS 99 (1954).

14. See generally Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051 (1970); Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFF. L. REV. 937 (1965); Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671 (1967); Note, *The Right of Expression in Prison*, 40 SO. CAL. L. REV. 407 (1967); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Comment, *Enforcement of Prison Discipline and its Effect Upon the Constitutional Rights of Those Imprisoned*, 8 VILL. L. REV. 379 (1963).

15. These objectives include retribution, restraint, rehabilitation, and deterrence. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 516 (1963).

16. E.g., *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954); *In re Taylor*, 187 F.2d 852 (9th Cir.), cert. denied, 341 U.S. 955 (1951); *Stroud v. Swope*, 187 F.2d 850 (9th Cir.), cert. denied, 342 U.S. 829 (1951); *Numer v. Miller*, 165 F.2d 986 (9th Cir. 1948); *Fussa v. Taylor*, 168 F. Supp. 302 (M.D. Pa. 1958); *Commonwealth ex rel. Smith v. Banmiller*, 194 Pa. Super. 566, 168 A.2d 793 (1961).

trine.¹⁷ In applying this doctrine courts have frequently relied upon the oft-quoted language used by the Supreme Court in *Price v. Johnston*.¹⁸

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.¹⁹

Several arguments have been advanced to justify use of the "hands-off" doctrine.²⁰ Some courts have ruled that they possessed neither the time nor the expertise to supervise the minute details of prison administration.²¹ Others have articulated a theory of separation of powers premised upon the argument that prison administration is an executive function, and, therefore, the judiciary should not interfere with correctional policy.²² A third view argues that judicial intervention would hinder the efforts of prison administrators to maintain discipline and security within their institutions.²³

Various criticisms have been leveled at these arguments.²⁴ From

17. For a more complete discussion of the "hands-off" doctrine see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

18. 334 U.S. 266 (1948).

19. *Id.* at 285.

20. Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181-82 (1970).

21. *E.g.*, McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) ("Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison."); SaMarion v. McGinnis, 253 F. Supp. 738, 741 (W.D.N.Y. 1966).

22. The courts have uniformly held that "supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions." Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962). "A court of equity does not have power in a case of this kind to superintend through injunctive processes the conduct of a federal penitentiary or its discipline." Dayton v. Hunter, 176 F.2d 108, 109 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949). "The prison system is under the administration of the Attorney General . . . and not of the district courts." Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949).

23. *E.g.*, Goodchild v. Schmidt, 279 F. Supp. 149, 150 (E.D. Wis. 1968) ("Federal courts do not ordinarily interfere in matters of internal prison discipline and management . . . and prisoners lawfully confined to state prisons have no absolute right to use the mails. In regard to many of his civil rights and privileges, the prisoner must yield to the internal discipline of the prison."); Golub v. Krinsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960); Peretz v. Humphrey, 86 F. Supp. 706 (M.D. Pa. 1949); O'Brien v. Olson, 42 Cal. App. 2d 449, 459, 109 P.2d 8, 15 (1941) ("[O]nly strict obedience to stern prison rules can possibly hold control over the eight thousand prisoners . . . many of whom are hardened, desperate, incorrigible criminals. Lax control . . . will inevitably lead to . . . mutiny . . . so as to endanger the lives of the prison officers and the maintenance of our prison system.").

24. Goldfarb & Singer, *supra* note 20, at 183-85.

the standpoint of judicial review of administrative action, it is difficult to distinguish the actions of correctional officials from those taken by a variety of other administrative bodies whose acts are reviewed by the judiciary.²⁵ In addition, there is little reason why judges cannot develop some expertise in the prison environment and its administration.²⁶ Courts have demonstrated that they are capable of reviewing many types of claims—desegregation of schools, student rights, and commitment of the mentally ill—which they had theretofore regarded as nonjusticiable. Furthermore, although the rationale that administrators will not be able to maintain prison discipline if the courts intervene is often voiced,²⁷ few courts have attempted to offer sound reasons for so ruling.

As recently as ten years ago courts had made so little progress toward changing the habits which had been developed through years of adherence to the “hands-off” doctrine that one commentator concluded:

[A] study of the cases involving alleged mistreatment indicates that the courts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situation.²⁸

Although to some extent this is still true, most courts now agree that inmates should not be totally at the mercy of the executive and legislative departments of the federal and state governments.²⁹ Courts have recognized that total dependence upon the “hands-off” doctrine not only leaves complete discretion for managing penal institutions in the

25. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 595 (1965).

26. George Bernard Shaw dramatized the seeming contradiction between a judge's sentencing power and his failure to follow up upon the effects of a sentence as follows: “Judges spend their lives in consigning their Fellow-creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable, which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion.” G. SHAW, *THE CRIME OF IMPRISONMENT* 14 (1946), previously printed as *Preface* to S. WEBB & B. WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* at vii (1922).

27. See authorities cited at note 23 *supra*.

28. Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962). It should be observed that suits against prison officials for extremely harsh or brutal treatment have long been brought under tort liability theories. In addition, there are various statutory remedies, such as the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). See generally Sneiderman, *Prisoners and Medical Treatment: Their Rights and Remedies*, 4 CRIM. L. BULL. 450 (1968).

29. See, e.g., *Pierce v. La Vallee*, 293 F.2d 233 (2d Cir. 1961); *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961); *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143 (S.D.N.Y. 1953).

hands of prison officials, but it may also mean that many legitimate legal claims of inmates are left unsatisfied.³⁰ Therefore, a growing number of courts are abandoning the general rule of abstention on questions of prisoners' rights, such as mail censorship, and are granting relief where it is warranted.

II. Prison Rules Regulating Outside Contacts Through The Mails

The control of mail to and from inmates has long been viewed as "an essential adjunct of prison administration and the maintenance of order within prisons."³¹ The inspection and recording of mail, especially in a large institution, involves an expensive, time-consuming series of procedures and takes many forms. These usually include: opening and inspecting letters and packages, reading letters, excising words out of letters before forwarding them to addressees, using fluoroscopes, x-rays and metal detectors to locate contraband,³² and feeling letters for contraband. If prison inspectors are dissatisfied with the contents of a letter or locate contraband, they have been known to refuse to send outgoing letters,³³ return incoming letters to senders,³⁴

30. See generally Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671 (1967).

31. *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964).

32. Contraband, as defined in the Director's Rules of the California Department of Corrections, constitutes:

- a. Anything not issued to you, sold to you through the canteen, permitted by the rules, or specifically authorized.
- b. Any property of another, except legal papers attached to a note from the owner, stating that he has lent them;
- c. Anything which is being misused;
- d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation.
- e. Any writings or voice recordings evidencing an intent on the part of the possessor to engage in, join with others in engaging in, or encourage others to engage in, any form of violent conduct within the institution;
- f. Any writings or voice recordings constituting escape plans or plans for the production or acquisition of explosives or arms, possession of which is forbidden by law to inmates of institution under the control of the Department of Corrections. Such material as may be contained in books, magazines, or newspapers which have been previously approved for receipt by inmates is excepted.

CALIFORNIA DEP'T OF CORRECTIONS, DIRECTOR'S RULES, RULE 1205 (1970).

33. See, e.g., *Marsh v. Moore*, 325 F. Supp. 392 (D. Mass. 1971) (prison practice of examining and returning "objectionable" mail to inmates).

34. See, e.g., *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967) (prisoner's letters to

and confiscate and destroy mail.³⁵

In order to regulate the flow and permissible types of mail coming into or leaving a prison, administrators have established various rules. For instance, many institutions limit the number of people on an inmate's list of authorized correspondents and the number of incoming and outgoing letters allowed per inmate per week.³⁶ In some prisons, inmates are not allowed to receive or send mail unless they first sign a written authorization allowing prison officials to inspect and censor all correspondence.³⁷ The guidelines prescribing what types of correspondence are acceptable are often set forth in rule books concerning prisoner conduct.³⁸

his attorney opened, read and contents thereof communicated to state attorney general); *Peoples v. Wainwright*, 325 F. Supp. 402 (M.D. Fla. 1971) (attorney's letters to prisoners returned unopened because they contained confidential communications between attorney and client).

35. See, e.g., *Meola v. Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971) (prisoner's petition to federal court torn up by guard).

36. "One of the maximum security institutions in the Federal system asked itself [why it had so many restrictions] and decided to eliminate restricting the numbers of people who would be permitted to write and to confine the volume of letters to 'reasonable' amounts. They found that after an initial flurry there were no more letters to process than before and they were spared the work involved in making numerous changes [in the list of acceptable addressees] and exceptions." M. RICHMOND, *PRISON PROFILES* 116 (1965).

37. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 237 (1970) [hereinafter cited as Jacob.] "Generally . . . correspondence is limited to persons on his approved correspondence list. Before a correspondent is approved a questionnaire is sent to him to ascertain his present status in the community, whether or not he desires to correspond with the inmate, and the type of influence he could possibly exercise over the inmate. Correspondence will usually not be authorized with former inmates, and prison officials exercise great care before approving the exchange of letters between an inmate and a woman other than his wife." *Id.* at 238-39.

38. Typical of the rules pertaining to letter writing are the following regulations promulgated by the California Department of Corrections:

D2401. MAIL PRIVILEGE.

The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges.

D2402. USE OF THE MAIL PRIVILEGES.

In addition to institution regulations the following provisions will apply to correspondence:

1. All your correspondence, packages, and personal property, sent or received, are subject to inspection and censorship. You shall not be permitted to send or receive a package or communication of any nature until you have signed the required form consenting to the opening of same and examination of its contents. No C.O.D. mail or C.O.D. articles of any kind will be accepted.
2. You will not have in your possession more than the number of stamped

These rules vary from one institution to another. For example, similar to California, in each federal institution there is a "prisoners'

-
- envelopes and postal cards prescribed by the institutional regulations.
3. If you are wholly without funds you may be supplied with paper, envelope, and postage for one letter each calendar week.
 4. You will be limited to the sending of a reasonable number of letters each week as determined by institutional regulations. All out-going inmate mail, except at the California Institution for Women, shall bear the inmate's name, register number, and relationship of the person addressed on the underside of the flap.
 5. Except at the California Institution for Women, all letters will be written on CDC Form 116.
 6. Except with the permission of the institutional head, no letters shall exceed one page written on both sides.
 7. You may not receive any article or merchandise unless specifically approved by the institutional regulations.
 8. You may not send or receive letters that pertain to criminal activities; are lewd, obscene or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate.
 9. Persons will not be permitted to correspond with more than one inmate unless they are members of the immediate family. Any exceptions must be approved by the institutional head.
 10. You may not send registered or certified mail, or any communication or article requesting a return receipt, without permission of the institutional head. Nothing in these rules shall deprive you of correspondence with your attorney, or with the courts having jurisdiction over matters of legitimate concern to you.
 11. Funds may be sent to you only by money orders or certified checks made payable to the Department of Corrections and indicating your name and number.
 12. You may subscribe to newspapers and periodicals unless disapproved by the institution. These must come directly from the publisher.
 13. Except with the permission of the institutional head, you may not correspond with other inmates or ex-inmates of any correctional institution. In addition you must obtain the permission of their *supervisor* before you can correspond with anyone on probation or parole.

D2403. APPROVAL OF CORRESPONDENCE LIST.

Each institution will establish such limitations on the number of correspondents permitted as are necessary. Established lists will provide for not less than ten correspondents.

D2404. CONFIDENTIAL LETTERS.

Inmates may address a sealed letter to the Governor of California, the Secretary of the Human Relations Agency, the Director of Corrections, a member of the State Legislature, the administrative head of the State or Federal agency or board responsible for their custody or release, or to a judge. Such communication will not be censored. Inmates shall place their name and number on the outside of the envelope or the letter will be opened and returned.

D2406. CENSORING.

The institutional head may provide for the censoring of inmate correspondence and the inspection of all inmate packages as deemed necessary. Correspondence to a court shall not be prevented from leaving the institu-

mail box" into which inmates at any time may deposit letters on any subject to such officials as the president of the United States, the attorney general, the director of the Bureau of Prisons, the pardon attorney, the Parole Board, the surgeon general, and the federal courts.³⁹ Many prison systems seek to regulate the content of outgoing letters,⁴⁰ the frequency with which inmates may receive letters,⁴¹ and some even stipulate that letters must be in English.⁴²

There seem to be no articulated standards governing prison practices for handling inmate mail. With the exception of the special rules concerning letters to certain public officials,⁴³ the common practice is for prison officials to read all correspondence mailed by prisoners, including communications addressed to judges, legislative officials, attorneys and private parties. Officials assert the prerogative of deleting any portion of correspondence between an inmate and his attorney which the officials do not consider relevant to the prosecution of the inmate's legal affairs.⁴⁴ Moreover, at least one censor has taken the position that "some attorneys are unscrupulous and would conspire with client-prisoners for criminal purposes," and for this reason, attorney-

tion for any reason.

Correspondence to or from a member of the State Bar or holder of public office or received from those officials listed in D2404 may be opened by a designated employee only for the purpose of ascertaining whether the correspondence is from the designated official and for searching for contraband. The subject matter of such mail except that which may be excluded pursuant to Subdivision 4 of the Penal Code Section 2600 shall be kept in strict confidence by the inspecting official. California Department of Corrections, Director's Rules, Rules 2401-06 (1970).

CAL. PEN. CODE § 2600(4) (West 1970) provides in part: "[P]rison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

For a thorough discussion of prison rules see Jacob, *supra* note 37, at 235-40.

39. See FEDERAL BUREAU OF PRISONS POLICY STATEMENT 7300. 2A (1967).

40. The rules of one institution stipulated that: "Officials [are] not to be criticized. [The] institution [is] not to be criticized. . . .

. . . .

Friendly letters to friends must be of a friendly nature. Business letters are to be confined to business." *Quoted in* D. CLEMMER, *THE PRISON COMMUNITY* 223-24 (1940) [hereinafter cited as CLEMMER].

41. *E.g.*, Maine State Prison, Information Rules & Regulations for Inmates 23, *cited in* Jacob, *supra* note 37, at 239 n.57.

42. Tennessee State Penitentiary, Guidance Manual for Prisoners 14, *cited in* Jacob, *supra* note 37, at 239 n.60. This practice is followed in spite of the rapidly rising percentage of Spanish-speaking inmates.

43. See rules quoted in note 38 *supra*.

44. See Rule D2406 quoted in note 38 *supra*.

client mail should be subject to censorship.⁴⁵ Often copies are made of letters and placed in the inmate's file; these letters may later be used in conjunction with proceedings before prison classification and disciplinary boards.⁴⁶ In addition, copies are sometimes made of letters to judges in which the prisoner complains of treatment or the institution. The reason often given for this practice is that prison officials want "advance warning of any possible litigation that might be instituted against them and [want to] be able to investigate the complaint and answer inquiries by the court."⁴⁷ Some institutions have recently begun to move in the direction of abolishing certain kinds of prison mail censorship.⁴⁸ The New York City prisons have experimented with allowing mail to go out uncensored,⁴⁹ and two state systems have modified traditionally stringent censorship regulations.⁵⁰ While the results of this movement are not yet in, so far there is no indication that prison discipline has been hindered by more liberal mail censorship rules.

III. The Justifications for Prison Mail Censorship

Censorship of prisoners' mail has long been a common administrative procedure in prisons. While as regulatory activity it may not be exercised arbitrarily,⁵¹ many courts have afforded prison officials a substantial degree of control over inmate mail.⁵²

Administrative control over this form of expression seems consistent with the objectives of the prison system, which include restriction of individual movement. Justifications for restriction of an inmate's freedom to correspond through the mails may be divided into two categories.

45. *Palmigiano v. Travisono*, 317 F. Supp. 776, 784 (D.R.I. 1970).

46. *Id.*

47. *Carothers v. Follette*, 314 F. Supp. 1014, 1020 (S.D.N.Y. 1970).

48. Jacob examined the rule books of thirty-two prisons in the federal system and those of twenty state systems and found that only two, Alabama and North Carolina, seemed to allow uncensored correspondence between an inmate and his attorney. Jacob, *supra* note 37, at 238 n.52.

49. *Rhem v. McGrath*, 326 F. Supp. 681, 690 n.9 (S.D.N.Y. 1971).

50. The State of Washington has abandoned censorship of outgoing mail, while permitting only a check of incoming mail for physical contraband. STATE OF WASHINGTON, OFFICE OF ADULT CORRECTIONS, MEMO. 70-5 (Nov. 6, 1970). New York now checks incoming mail for physical contraband in the presence of the recipient but permits sealed letters to counsel to go out uncensored. NEW YORK DEPT OF CORRECTIONAL SERVICES MEMO. 79 (Apr. 7, 1971).

51. *Fulwood v. Clemmer*, 206 F. Supp. 370, 375 (D.D.C. 1962).

52. See authorities cited at notes 21-23 *supra*. But see *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970).

ries: (1) the purposes of incarceration; (2) the purpose of maintaining orderly and secure prisons.⁵³

A. Implementing the Purposes of Incarceration Through Censorship

The generally accepted purposes of confinement, or accepted objectives of corrections, are four in number. The first of these, *retribution*, is an implicit factor in committing convicted individuals to correctional institutions.⁵⁴ While many deprivations undergone by inmates are justified in terms of administrative convenience and financial feasibility, some of the deficiencies found in our prisons are undoubtedly founded upon the belief that convicts are not entitled to have their needs satisfied as readily as those of free persons. Since retribution has been discredited as a modern social justification for imprisonment,⁵⁵ one hesitates to posit this as a formal rationale behind prison mail censorship.⁵⁶ Nevertheless, one must necessarily conceive that some censorship of prisoners' mail is carried out as retaliation against inmates within the informal social structure of penal institutions.⁵⁷ If censorship of mail has a place in the hierarchy of deprivations that underlie a retributive theory of corrections, the logical conclusion is that communication with the outside world is one of the penalties which is placed on those serving their "full debt to society."

A second goal of penology, *restraint*, or the incapacitation of dangerous individuals by removing them from their potential victims, is said to be served by a prison censorship policy. Obviously, preservation of institutional security is an important consideration if the goals of prisoner custody and internal discipline are to be accomplished. In

53. Note, *The Right of Expression in Prison*, 40 So. CAL. L. REV. 407, 410-11 (1967). The categories are listed and fully explained in E. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 519-47 (7th ed. 1966).

54. See Address by J. V. Bennett, former Director, U.S. Bureau of Prisons, before the American Law Institute, Washington, D.C., May 20, 1954, in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, *CRIMINAL LAW* 401 (1962): "Most judges . . . send men and a few women to prison to be corrected, to be redirected—to be rehabilitated—call it what you will. And they send them there *as* punishment and not primarily for punishment."

55. See Floch, *Are Prisons Outdated?* in *PENOLOGY* 10 (C. Vedder & B. Kay ed. 1964).

56. In a recent decision concerning censorship of the mail of county jail inmates awaiting trial, the court found that since "prisoners who are awaiting trial are not to be punished at all, except to the extent necessary to preserve order," there could be no censorship requirements limiting outside communications. *Jones v. Wittenberg*, 330 F. Supp. 707, 719 (N.D. Ohio 1971).

57. See generally G. JACKSON, *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* (1970).

order to achieve maximum security, incoming letters are screened for escape plans, instruments of escape, pornographic material, drugs, and other contraband.⁵⁸ Inspection of outgoing mail is carried out to prevent inmates from making arrangements for escape and to stop possible complicity in illicit activity both within and outside the prison.⁵⁹ Although prison authorities have been criticized for being overly paranoid about their precautions to prevent escapes and maintain discipline,⁶⁰ there is little likelihood that society in general, or many judges, will decide in the foreseeable future that restraints such as mail censorship serve absolutely no purpose in the overall security scheme of our penal system.⁶¹ Consistent with this conclusion are the many decisions following the "hands-off" doctrine in which courts have refused to assume jurisdiction of prisoners' complaints so as to avoid conflict with the disciplinary policies of correctional institutions.⁶² More justification exists for judicial reluctance to prohibit prison authorities from censoring incoming mail, particularly packages, since it is more likely to contain illicit drugs or other contents. On the other hand, simply because society has charged prison officials with the responsibility of restraining inmates from certain contacts both within and outside the prisons is no reason to allow them unbridled control of all inmate behavior. If total authority were placed in the hands of these administrators, the guarantee of *Coffin v. Reichard*—that a prisoner retains all rights except those taken from him expressly or by necessary implication of law—would become a wholly empty expression. Further, much of the control which prison authorities are able to hold over inmates is a result of a

58. *Palmigiano v. Travisono*, 317 F. Supp. 776, 783 (D.R.I. 1970).

59. "Real ingenuity is developed in manufacturing phrases and words which have ambiguous meanings, ambiguous to the extent that the ostensible meaning is innocent yet the hidden meaning, if known, would be censored. . . . Innocent enough is the . . . phrase, "The mosquitoes are getting worse," [which] may mean that the inmate's associates in the offense are becoming more threatening; or an innocent word like "weather" may mean "escape," as in the phrase, "Can't figure out the weather," means "I can't beat this joint." How much of this duality comes into the letters is unknown, although probably such devices are used only by the most advanced offenders." *CLEMMER*, *supra* note 40, at 224.

60. G. SYKES, *THE SOCIETY OF CAPTIVES* 11 (1958).

61. In *Conklin v. Hancock*, 334 F. Supp. 1119 (D.N.H. 1971), the court justified the reading of a prisoner's outgoing mail on the basis that he had previously participated in escape attempts and therefore represented a high security risk.

62. See note 16 *supra*. Some of the language used by various courts in reaching their conclusions include: "courts have no supervisory jurisdiction over the conduct of the various institutions," *Garcia v. Steele*, 193 F.2d 276, 278 (8th Cir. 1951); "a court does not have power . . . to superintend," *Sturm v. McGrath*, 177 F.2d 472, 473 (10th Cir. 1949); "it is not [the court's] province to supervise prison discipline," *Numer v. Miller*, 165 F.2d 986, 987 (9th Cir. 1948).

complex set of social relationships between the prison staff and the inmate population.⁶³ These relationships are often based more upon a sense of cooperation than threats of the use of force.⁶⁴ In sum, there are conflicting views on the question whether mail censorship fulfills as important a function in the penal objective of restraint as some might ascribe to it.⁶⁵

A third purpose of incarceration is *deterrence*, or the discouragement of persons from committing crimes and keeping those who have been caught for criminal activity from engaging in it again. Part of the deterrent value of long prison sentences is thought to be the exposure of the prisoner to the undesirable aspects of prison life. Deterrence may play a small part in the decision to censor the mail of prisoners. Few would deny that the degree of isolation involved in imprisonment militates against any improvement in relationships with outside persons. Sykes observes:

[I]mprisonment means that the inmate is cut off from family, relatives, and friends, not in the self-isolation of the hermit or the misanthrope, but in the involuntary seclusion of the outlaw. It is true that visiting and mailing privileges partially relieve the prisoner's isolation—if he can find someone to visit him or write to him and who will be approved as a visitor or correspondent by the prison officials.⁶⁶

However, whether prisoners are actually deterred from a life of crime by restrictions upon mailing privileges is questionable. Making an inmate's daily existence more difficult by depriving him of social relationships seems more likely to have the opposite effect. By building up

63. See SYKES, *supra* note 60, at 45-62; CLEMMER, *supra* note 40, at 149-80; Weinberg, *Aspects of the Prison Social Structure*, 47 AMER. J. SOC. 717 (1942).

64. The chief characteristic of this prison social system is the caste-like division between those who rule and those who are ruled. The atmosphere of the prison in varying degrees is strictly authoritarian. The essential character of the relationship between the administrative staff and the inmates is one of conflict. There is a gulf of fear and mistrust in most prison systems separating the authorities on the one hand from the inmate body on the other. This gulf is bridged in many ways and at many points, for otherwise the system could not function. L. OHLIN, *SOCIOLOGY AND THE FIELD OF CORRECTIONS* 14 (1956).

65. Mark S. Richmond, a veteran of twenty-five years experience in prison work summarized the issue of mail censorship as follows:

In all correspondence policies there can be no doubt that institutional security is a primary concern. Responsibility for this is exercised through limiting the persons with whom an inmate may correspond and by censoring or inspecting all letters that are sent and received. Few people would deny the necessity of such control measures, yet few could accept the affrontery, officiousness and denial of purpose that have been condoned over the years in the name of security. M. RICHMOND, *PRISON PROFILES* 114 (1965).

66. SYKES, *supra* note 60, at 65.

resentment within prisoners against trivial rules, minute regulation of prison life may operate to impede reformation of criminal character by creating feelings of isolation and hostility.⁶⁷ If an aim of incarceration is *really* to deter individuals from crime, greater exposure to the outside through freer correspondence policies rather than restrictions would probably tend to improve the ties of friendship and family which are essential upon release.⁶⁸

Lastly, *rehabilitation*, resocialization of the individual so that upon termination of his sentence he will be able to take a useful place in the society, has been offered as a justification for prison mail censorship. The traditional view of correctional authorities is that the prisoner can better learn to conform to societal norms if he is prevented from making contact with undesirable persons outside⁶⁹ and from maintaining control or contact with his unlawful activities on the outside.⁷⁰ It might also be postulated that censoring letters that are ob-

67. The social psychology of confinement creates a gulf between prisoners and the free community. The psychological isolation of the inmate is described in the following statement: "Within prison walls the authorities impose restrictions, and the conditions of confinement influence the attitudes of inmates. Regulations restrict the inmates' associations with one another, with the prison staff, and with outsiders. Daily life is routinized in dress, manner of carrying out tasks, manner of eating, recreational activities, and a host of mundane details. Forced assignment to the group officially rated as outcasts is a blow to self-esteem. The fact of physical isolation symbolizes a psychological isolation from the world of 'respectable' and 'decent' people. The inmate may react by rejecting the 'respectables.'" E. JOHNSON, *CRIME, CORRECTION, AND SOCIETY* 498 (rev. ed. 1968).

68. The findings of at least one study seem to confirm this conclusion. "Independent of such diminution of criminal influences, in cases where prison separates an offender from relatives with whom he has been in conflict, it may facilitate the renewal and release of affection between them which was repressed during conflict. This principle, expressed in common speech as 'absence makes the heart grow fonder,' perhaps arises from the fact that separation permits memory to focus on a preconflict relationship. For offenders who had been out of contact with their family, imprisonment may actually mean a renewal of communication with the family.

Of course, there often also is a materialistic side to this, as blood relatives may be the only ones willing or allowed to send the inmate money for commissary expenditures. Finally, the inmate's dependence on assistance of relatives for the success of any realistic hopes he may have of achieving self-sufficiency after prison may directly enhance their influence as positive reference groups for him. Thus, confining an offender with criminals may actually increase his differential identification with anticriminal persons." D. GLAZER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 370 (1964).

69. See *Fussa v. Taylor*, 168 F. Supp. 302 (M.D. Pa. 1958) (letter of inmate who had received permission to write to his common law wife who was incarcerated at another institution confiscated and returned because superintendent at second institution saw no constructive elements in the relationship).

70. The Rhode Island Assistant Director for Correctional Services has testified that he has a "statutory duty to engage in censorship for the protection of the

scene or in poor taste promotes rehabilitation by teaching correct habits. While censorship for these reasons does not impose upon inmates the harshness of the Auburn System,⁷¹ which prohibited speech among prisoners as a means to both maintain discipline and prevent their corrupting one another, it is often difficult to distinguish the rehabilitative justifications for mail censorship from those based upon the correctional goal of restraint.⁷² By removing convicted criminals from society, the correctional system does not automatically guarantee them the opportunity to reform themselves and to avoid recidivism. Rather, the system operates to resocialize inmates in order that they may adjust to the prison environment and its values. Some of these values, such as blind obedience to authority and lack of freedom of communication, may actually *reduce* a prisoner's ability to function normally in the outside community. In addition, limiting contact with the outside may complicate the problems of individuals who had communication difficulties when they were in society.

The most effective means of encouraging rehabilitation of the inmate is to give him an opportunity to become self-reliant and to make decisions for himself. Instead of limiting and prescribing the social relationships which inmates may have with persons on the outside, prison authorities should encourage prisoners to communicate with the outside world. Indeed, it seems doubtful that limiting the number of letters which may be sent, striking out parts of letters or confiscating them, and forbidding correspondence with certain persons serve rehabilitative purposes.⁷³ As one former inmate has remarked:

public [since] [s]ome inmates would engage in 'confidence' schemes . . . in the absence of censorship [and] there is a danger that prisoners will enter into criminal conspiracies with persons outside the prison." *Palmigiano v. Travisono*, 317 F. Supp. 776, 784 (D.R.I. 1970).

71. "The theory of the 'Auburn System' was simplicity itself. Maintain silence at all times, and you remove absolutely from prisoners the chance to corrupt each other. They can do each other no damage by their physical proximity, but, if granted communication with each other, they become a force for evil and an ever-present source of insurrection and riot." O. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845*, at 86-87 (1922).

72. It is interesting to note, however, that the testimony of the Rhode Island Assistant Director for Correctional Services, *supra* note 70, is couched in terms of "protecting society" and "shielding the courts" rather than stating the interests of mail censorship as a function of rehabilitating the inmate.

73. "Inmate letterheads in some institutions are so filled with lengthy printed explanations of the conditions under which correspondence may be permitted that it overshadows the space left for the body of the letter. I have seen mail censors summarily reject and return 'objectionable' letters with or without a cryptic 'explanation' of the reason. I have seen letters, including valuable papers or cherished pictures that were enclosed, mutilated by unnecessarily rough and indifferent hand-

One of the most important elements tending to foster rehabilitation is the maintenance of family ties, of peer group relations, of a sense of belonging. Most prisons make it totally impossible for the inmate to maintain relationships with those outside. Visits are strictly limited; letters are permitted only to selected, approved individuals, and then only weekly, bi-weekly, or even monthly. A man is sent to prison in his late teens or early twenties. His peer group moves ahead in the social scale. His friends enter business, marry, have children. The prisoner is entirely cut off from development of any kind. When he is released, seven or eight years later, his erstwhile friends have progressed beyond him; they have become strangers. He no longer has an in-group; he belongs nowhere. Imprisonment, in a word, maximizes social severance. And social severance works against rehabilitation.⁷⁴

If rehabilitation and treatment are to be objectives of our penal system, enhancing an inmate's self-respect and individuality by allowing him to assert himself through the avenue of verbal intercourse with the outside would be desirable. One wonders what is the worth of all the educational, recreational, and vocational facilities with which prisons are equipped in the name of rehabilitation (even though there are hardly enough of these) if inmates are not helped to suppress their antisocial attitudes through more free out-of-prison contacts.⁷⁵ Of course, mail restrictions are only one component in a complex set of deprivations suffered by the inhabitants of our penal institutions; however, if prisons are to serve any rehabilitative function at all, they must begin to permit the incarcerated easier accessibility to the society to which most of them will one day return.⁷⁶

ling. More than one inmate of my acquaintance has been severely punished for criticizing the institution in a letter or for identifying an officer or another inmate by name." M. RICHMOND, *PRISON PROFILES* 114 (1965).

74. Leopold, *What is Wrong with the Prison System?* in *THE TASKS OF PENOLOGY* 31 (H. Perlman & T. Allington ed. 1969).

75. "The evaluation [of the institution's contribution] must rather be made in terms of how the prison authorities are affecting the total social climate, how successful they are in enabling the less hostile persons to advance themselves, how successfully they are protecting these people from intimidation or exploitation by the more antisocial inmates, how effectively they curb and frustrate the lying, swindling, and covert violence which is always under the surface of the inmate social world." *Warden's report on the operations of the New Jersey State Prison for the year 1953-1954* in SYKES, *supra* note 60, at 36.

76. A former warden has stated: "Receiving letters is less pleasurable than writing them except in those instances when the letters bear good news pertaining to the inmate's status. Usually letters from home or friends include thoughts which cause lonesomeness, shame, vindictiveness, feelings of being unwanted, feelings of being misunderstood, and sorrow or remorse in other forms. It is only the rare letter received by an inmate which contains humor, non-personal abstractions, or subtle encouragement." CLEMMER, *supra* note 59, at 225.

B. Implementing Orderly Administration Through Censorship

The second principal justification for restriction of an inmate's freedom to correspond through the mails is maintaining orderly prison administration. In this category are, with a variation of emphasis, many of the reasons given above for censoring prisoner mail in order to fulfill the basic objectives of the penal system. The primary goal of administrators is obviously to retain custody of the prisoners under their control. By limiting the list of permissible correspondents to those least likely to help an inmate formulate an escape plan, send narcotics or contraband, or cooperate in an illegal business scheme, this end is more easily achieved. In addition, inspection of outgoing letters gives prison personnel an overview of inmate complaints concerning the institution generally or about individual administrators or guards, but like so many other aspects of the prison environment, little is known about the relationship between censorship and the orderly functioning of penal institutions. Therefore, it is difficult to calculate whether censorship serves the purpose of administrative ease for which it is advanced. However, one commentator, in attempting to define what constitutes "reasonable" prison rules, has stated:

Courts, in testing prison regulations and the actions of officials by a standard of reasonableness, will have to start distinguishing those actions and regulations which stem so directly from the structure of penal institutions and the allocation of resources to the prison system as to be deprivations imposed "by necessary implication [of] law" and therefore virtually *per se* reasonable, from those actions and regulations which could be condemned by a court without forcing a radical reconstitution of the present system.⁷⁷

Only through abandonment of the "hands-off" doctrine will courts be enabled to penetrate the reasons given by prison administrators for their practices and arrive at reasonable guidelines.

IV. Mail Censorship and Inmates' Legal Remedies

For purposes of analysis, it is helpful to discuss inmates' remedies according to the type of communication. Courts have, generally speaking, considered the right of inmates to communicate with respect to three types of mail: mail addressed to courts, to counsel, and to officials.

A. Mail Addressed Directly to Courts

Most of the earlier cases involved the right of inmates to com-

77. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 531 (1963) (footnotes omitted).

municate with the courts concerning legal matters relating to the criminal conviction that brought about their incarceration. For instance, in *Ex parte Hull*,⁷⁸ decided in 1941, the Supreme Court ruled that a prison official could not refuse to accept and mail an inmate's habeas corpus petition. Rejecting the warden's contention that prison censorship regulations justified denial of access to the courts, the Supreme court said:

[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.⁷⁹

Despite this clear mandate, courts have been slow to allow inmates complete freedom to correspond with the courts without official censors peering over their shoulders. Judges have been most willing to intervene on behalf of prisoners when censorship has interfered with the ability of inmates to communicate with the courts themselves.⁸⁰ Thus, the statement has been made that "a right of access to the courts is one of the rights a prisoner clearly retains."⁸¹ Undue restrictions of reasonable access have been ruled to be a denial of equal protection⁸² or due process.⁸³

Nevertheless, simply stating that an inmate has a right of "free access" to the courts does not ensure that communications mailed to courts will not be inspected by prison administrators.⁸⁴ Indeed, in

78. 312 U.S. 546 (1941).

79. *Id.* at 549.

80. *See, e.g.,* United States v. Simpson, 436 F.2d 162, 166-70 (D.C. Cir. 1970); Burns v. Swenson, 430 F.2d 771, 777 (8th Cir. 1970); Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970); Conway v. Oliver, 429 F.2d 1307, 1308 (9th Cir. 1970); McDonough v. Director of Patuxent, 429 F.2d 1189, 1192 (4th Cir. 1970); Gittlemacker v. Prasse, 428 F.2d 1, 7 (3rd Cir. 1970); Wimberley v. Field, 423 F.2d 1292, 1294 (9th Cir. 1970); Sigafus v. Brown, 416 F.2d 105, 107 (7th Cir. 1969); Smartt v. Avery, 370 F.2d 788, 791 (6th Cir. 1967); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); United States *ex rel.* Foley v. Ragen, 52 F. Supp. 265 (N.D. Ill. 1943), *rev'd*, 143 F.2d 774 (7th Cir. 1944); *In re* Robinson, 112 Cal. App. 2d 626, 246 P.2d 982 (1952); Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961). *But see* Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950); *In re* Chessman, 44 Cal. 2d 1, 279 P.2d 24 (1955).

81. Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966).

82. *E.g.,* Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942).

83. *E.g.,* Hynes v. Dickson, 232 F. Supp. 796 (N.D. Cal. 1964).

84. *Cf.* Prewitt v. Arizona *ex rel.* Eyman, 315 F. Supp. 793, 794 (D. Ariz. 1969).

certain instances, restrictions have been placed on the types of complaints that inmates are allowed to bring to a court's attention.⁸⁵ Some of the results of such a system of "free access" are telling. For example, in one case⁸⁶ an inmate wrote to a state judge claiming that he had been the victim of a "calculated plan or system of harassment" visited upon him by prison officials. This letter was read by an institution officer, who recommended that the inmate be summoned before a disciplinary board which charged him with "making false and lying statements about the administration of the prison."⁸⁷ The board, consisting only of the assistant deputy warden, sent the prisoner to segregation for an indefinite term and he remained in isolation for more than four months.⁸⁸ This example not only graphically illustrates the meaninglessness of certain prison "rights," but also demonstrates the detrimental effects which may befall inmates when prison officials are given full power to determine what kinds of contacts prisoners may have with the outside world.

Judicial reluctance to scrutinize the claims of inmates that access to the courts has been denied seems to stem from a combination of factors: blind adherence to the doctrine of abstention,⁸⁹ a failure to fully analyze the facts presented by individual cases,⁹⁰ and an unwill-

85. *Harrell v. State*, 17 Misc. 2d 950, 188 N.Y.S.2d 683 (Ct. Cl. 1959) (prisoner may not be permitted to sue prison officials for damages during his incarceration arising out of alleged injuries due to mistreatment or prison negligence).

86. *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970).

87. *Id.* at 1020.

88. *Id.* See also Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969). Using depositions sworn to by prison officials, the authors documented at least one case in which a prisoner was confined to his cell without exercise of normal privileges for close to a year. The only reason given by the prison superintendent was that "in my judgment I think that is where he should be." The Director of the Department of Welfare, the superintendent's superior, indicated that he knew of no reason for the punishment other than that the prisoner was a plaintiff in a suit to desegregate the prison. *Id.* at 808-09.

89. For example, in *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954), the court upheld a prison official's failure to deliver a prisoner's letter which allegedly contained material necessary to a court action for his appeal. Although it was not clear whether delivery of the letter *actually* affected the prisoner's appeal the court was content to rest upon the conclusion that the withholding of inmate mail was purely an administrative matter. Similarly, when a petitioner alleged that he was denied the right to transmit a petition for habeas corpus because he failed to enclose the requisite number of copies of the petition, a state court denied relief because the action complained of was a matter of "internal management" with which it would not interfere. *Commonwealth ex rel. Sharp v. Day*, 89 Pa. D. & C. 605 (C.P. 1954). See also *Oregon ex rel. Sherwood v. Gladden*, 240 F.2d 910, 912 (9th Cir. 1957); *In re Chessman*, 44 Cal. 2d 1, 279 P.2d 24 (1955).

90. It is interesting to note that *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954),

ingness or inability to evaluate prison censorship rules to determine if the purposes of incarceration are being achieved.⁹¹ For example, in *Coleman v. Peyton*⁹² a state prisoner contended that prison censorship procedures interfered with his right of free access to the courts. In responding to this contention, the court commented:

[The] right of access to the courts is one of the rights a prisoner clearly retains. It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious.⁹³

However, relying upon the principle that courts will not inquire into the reasons for mail censorship if the purposes of orderly administration are at stake, the court declined to interfere with the institution's policies.⁹⁴ This holding was based upon the absence of any purpose by the warden to hinder or delay prisoners in their access to the courts. But the court made no effort to relate the prison's censorship requirements to the content of the inmate's correspondence. Mention was made neither of shielding the court from some unacceptable forms of speech written by the inmate, nor protecting the institution's internal security by intercepting the letter. Instead, the court chose to pay lip service to the notion of an inmate's right to unburdened access to the courts, while it decided the prisoner's case adversely on the warden's assurance that

relied upon *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683 (S.D.N.Y. 1944) and *Reilly v. Hiatt*, 63 F. Supp. 477 (M.D. Pa. 1945). Neither of these cases, however, involved censorship of mail sent to courts. Instead, they concerned correspondence to private parties. Thus, the Ortega court failed to analyze the essential difference between interests served by censoring mail to private parties and correspondence addressed to the courts.

91. See *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961), where the court used a "surrounding circumstances" rule in deciding that containment in solitary confinement was a sufficient reason to justify regulations prohibiting communications to and from courts, judges and attorneys except as to cases already pending. The fact that a prisoner is in solitary confinement seems completely extraneous from his right to make complaints about the treatment he is being afforded in prison.

92. 362 F.2d 905 (4th Cir. 1966).

93. *Id.* at 907.

94. The court made this finding despite its explicit recognition of contradictory federal regulations applicable to federal prisons situated within the Fourth Circuit: "Letters addressed by a federal prisoner to a relevant court or one of its judges are not censored. They are mailed with notices that they have not been censored and that the recipients are requested to report any abuse of the right to address the court without censorship." 362 F.2d at 907 n.4. *Cf. Dodge v. Bennett*, 335 F.2d 657 (1st Cir. 1964) (district court does not have jurisdiction to call Director of Bureau of Federal Prisons before it for the purpose of determining whether he had been within his jurisdiction in delaying normal service of mail from penal institutions under his control).

the censorship policy resulted in a mere "delay" without an intent to hinder the prisoner's access to the courts. The court would have arrived at a more logical result by setting forth the specific reasons necessitating denial of relief. If the right of access to the courts by inmates is truly to be regarded as "precious," then courts should provide persuasive reasons why administrative fetters such as censorship are to be placed upon its exercise.

Freedom of access to the courts has meaning beyond the bare requirement that prison officials physically transmit an inmate's mail to a court regardless of whether it has gone through a censorship process. Writing to a court may be the only way a prisoner can voice his complaints concerning his treatment. Unless an inmate has unhindered access to judges and courts, he may be subjected to harassment by his captors after attempts to communicate with a court.⁹⁵ Under the regime of a censorship system, the very prison staff against whom he may have complaints not only constantly watches over him but also controls his daily movements. While meaningful access to the courts may also entail an administrative apparatus through which inmate complaints can be heard and dealt with in a manner consistent with the objectives of incarceration,⁹⁶ freedom to communicate one's grievances to the courts without threat of official reprisal is vital.

When prisoners have been able to inform the courts that punishments stemmed from their legitimate efforts to air grievances in court, judges have had no problem in condemning the reprisals and enjoining their repetition.⁹⁷ In *Talley v. Stephens*⁹⁸ the court recognized the problem of reprisal is particularly acute where a convict complains to a court about physical mistreatment inside the institution and "a theoretical right of access to the Courts is hardly actual and adequate if its exercise is likely to produce reprisals, physical or otherwise, from

95. See Hirschkop & Millemann, *supra* note 88.

96. California Assembly Bill 1181, introduced in 1971, proposed that an Ombudsman for Corrections be appointed. The ombudsman would have had power to receive and process complaints and conduct investigations concerning unreasonable or unfair treatment of prison complaints. Further, he would have been able to make inquiries and hold public or private hearings on prison matters. Although this bill was passed by both houses of the legislature it was vetoed by Governor Ronald Reagan.

97. In *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967), a federal court invalidated a parole board regulation that postponed for one year the parole eligibility of any inmate who filed a habeas corpus petition in court. The court ruled that the parole board could not penalize prisoners for exercising their constitutional and statutory right of access to court by withholding a privilege (consideration for early release) that would otherwise have been granted.

98. 247 F. Supp. 683 (E.D. Ark. 1965).

Penitentiary personnel."⁹⁹ Similarly, in *Meola v. Fitzpatrick*¹⁰⁰ the court found prison officials had denied an inmate access to the courts on at least four occasions by either refusing to mail or destroying hand written petitions addressed to courts and had transferred him for his petition writing activities. The official practice had been to review all petitions and forward some of them to the superintendent, who would return petitions to prisoners if there were copetitioners unless all copetitioners clearly had consented or if the language was possibly "improper."¹⁰¹ In issuing an injunction prohibiting the practice of screening the contents of the prisoner's communications to courts or to attorneys representing him as counsel of record in any court proceeding, the court discovered little justification for the practice "except the trivial one of protecting the sensibilities of court officials."¹⁰² The court went on to state:

The fact that prisoners may exaggerate about prison conditions and make false allegations against prison officials cannot justify prison review and censorship of the contents of an inmate's correspondence with the courts.¹⁰³

Psychologically, if inmates feel that they have been wronged by the correctional or judicial systems, for them to find some "new direction" or redefined values is difficult if the same systems prohibit them from seeking just redress. Further, planning for the future is often made difficult by a sentencing and parole system that leaves many inmates in "limbo" for years.¹⁰⁴ Thus, one inmate has stated, "in seeking

99. *Id.* at 690; *accord*, *Carothers v. Follette*, 314 F. Supp. 1014, 1022 (S.D.N.Y. 1970), where the court stated that "imposition of punishment or threat of such punishment based upon a prisoner's statements or complaints to the court about prison conditions chills the prisoner's exercise of his First Amendment right to voice legitimate complaints, and thus would amount to a form of deterrent censorship."

100. 322 F. Supp. 878 (D. Mass. 1971).

101. The court found that although the stated official purpose of censorship of court petitions was to screen out obscene language, the evidence indicated that prison authorities considered obscenity to include language which was critical of them. 322 F. Supp. at 884 n.7.

102. *Id.* at 878.

103. *Id.*

104. There are various psychological motives for prosecuting legal actions from prison. According to one "writ-writer": "The first is an outgrowth of the prison's social environment. Sentenced to serve a term in the state prison under what is termed the 'Indeterminate Sentence Law,' the prisoner is caught in a dilemma which causes him considerable frustration and despair. He does not know when his sentence will terminate, and must therefore choose between taking his case to court or waiting for the Adult Authority to fix his term of imprisonment. If he chooses to write writs, it is only because the remote possibility of winning his case offers him better odds than waiting for the Adult Authority to set a definite sentence. On the other hand, he may fear that the authorities would disfavor anyone who denies his guilt by con-

relief from the courts, [the prisoner] is pursuing a course of action which relieves the tensions and anxieties created by the sentence system."¹⁰⁵ In summary, access to the courts without the apprehensions imposed upon inmates by a censorship process may lead to betterment of prison conditions through freer opportunities for inmates to bring grievances into the judicial process and establishment of faith in a criminal justice system in which an inmate may feel that he has been denied an "even break."

B. Mail Addressed to Counsel

The rule in federal prisons¹⁰⁶ and at least some state correctional systems¹⁰⁷ is that inmates may send uncensored mail to courts, public officials and attorneys, as long as correspondence is checked for contraband. The prevalent practice in most state institutions, however, is for attorney-client mail to be subject to full censorship.¹⁰⁸ Notwithstanding the confidential nature of the attorney-client relationship,¹⁰⁹ prison authorities have asserted that maintenance of internal order necessitates screening of mail sent from a prisoner to his attorney.¹¹⁰

tinuing to litigate his case. If the prisoner does not write writs, he may never get out; if he does write writs, he may never receive parole." Larson, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 348 (1968).

105. *Id.*

106. In federal prisons, letters from attorneys may be checked to see whether they contain contraband (e.g., drugs, knives, or narcotics), but their content is free from censorship. See *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967); *Haas v. United States*, 344 F.2d 56, 67 (8th Cir. 1965); *Konigsberg v. Ciccone*, 285 F. Supp. 585, 597 (W.D. Mo. 1968); *Hirschkop & Millemann*, *supra* note 88, at 795, 826, nn. 165 & 166.

107. See notes 58-60 & accompanying text *supra*.

108. See Jacob, *supra* note 37, at 38 n.52; see *Rhinehart v. Rhay*, 314 F. Supp. 81 (W.D. Wash. 1970) (prison authorities permitted to withhold letters to an inmate's attorney because they referred to "boundless" acts of "oral sodomy" among the prison population and thus violated prison regulations against letters containing vulgar or obscene matter or complaining about prison policies); *Brabson v. Wilkins*, 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967) (prison officials enjoined from withholding communications addressed to prisoner's attorney concerning the legality of his detention or treatment in prison but letters may be censored by authorities and any material unrelated to these subjects may be deleted). Cf. *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964) (prisoner has no constitutional right to seek legal assistance in spreading antisemitic propaganda). But see *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970) (prison officials enjoined from refusing to send inmate's correspondence to American Civil Liberties Union but no mention made of censorship of mail); *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

109. See, e.g., CAL. EVID. CODE §§ 950-54 (West 1966), *as amended* (Supp. 1971).

110. E.g., *Green v. Maine*, 113 F. Supp. 253, 256 (D. Me. 1953), where the court ruled that: "The opening and inspection of mail passing back and forth between pris-

Underlying prison officials' reluctance to allow unhindered correspondence seems to be a feeling that some unscrupulous inmates and attorneys will use the opportunity for sending uncensored mail to aid possible escape plans, transport illegal contraband, supply connections with other outside individuals, or even further political activity.¹¹¹ In addition, officials fear attorney-client correspondence can be used to transmit messages to other inmates, transact business of a nonlegal nature, and forward various illicit information. Courts have upheld censorship of attorney-client letters relying upon these and other arguments.¹¹² As in other areas, courts have frequently found that the decision whether or not to allow a free flow of mail between inmates and attorneys rests within the province of prison authorities because they possess the peculiar expertise to determine when prison discipline or correctional objectives would be subverted by outside influences.¹¹³

In contradistinction, several courts have recently ruled that prison officials were barred from censoring attorney-client mail. In *Marsh v. Moore*¹¹⁴ an inmate alleged he could not properly prepare an action because censorship procedures interfered with his attempts to confer freely with his attorney. The court recognized that the state has a legitimate and substantial interest in maintaining prison security by excluding contraband and weapons and through limiting outside contacts for illegitimate purposes.¹¹⁵ Nonetheless, it ruled that:

[T]here has been no showing that uncensored correspondence between plaintiff and his attorney of record in this action would in any way jeopardize prison administration, security, or discipline. At most, there appears to be only a very remote and wholly spec-

oners and those at liberty is an ordinary, usual and obviously essential incident to the safe custody of prisoners."

111. The following is a statement of the Legal Counsel to the Federal Bureau of Prisons: "The mere fact that the correspondent is an attorney does not mean that the requisite relationship has been established. As a practical matter attorneys many times perform a variety of services for their clients which do not involve legal advice. They are business agents, public relations men, or just friends. It is most difficult for the administrator to ascertain intelligently in what capacity certain correspondence is carried on. But even where the attorney-client relationship is established, it seems obvious to me that the maintenance of the security of the institution requires that the administrators retain the right to open and inspect incoming and outgoing mail. Unfortunately, a small minority . . . of the bar are not above reproach." Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 675 (1966).

112. See, e.g., *Cox v. Crouse*, 376 F.2d 824, 826 (10th Cir. 1967); *Lee v. Tahash*, 352 F.2d 970, 971 (8th Cir. 1965); *United States ex rel. Vraniak v. Randolph*, 161 F. Supp. 553, 559 (E.D. Ill. 1958).

113. See *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970).

114. 325 F. Supp. 392 (D. Mass. 1971).

115. *Id.* at 394-95.

ulative danger that an attorney, an officer of this court, would assist a prisoner in avoiding legitimate prison regulations.¹¹⁶

In granting a preliminary injunction against censorship of mail between the prisoner and his attorney, the court specified that prison officials could manually manipulate envelopes to uncover contraband, examine correspondence with a fluoroscope or a metal-detecting device, and that communications were to be restricted to litigation and could only be sent in letters in envelopes, not packages.¹¹⁷ In a similar decision, the district court in *Smith v. Robbins*¹¹⁸ recognized the possibility existed that prison authorities might still read attorney correspondence despite proposed revised regulations for the Maine State Prison, which would provide that outgoing mail to courts, certain public officials, and attorneys could not be opened, read, or inspected and that incoming mail from verified addresses of such persons could be opened in the prison mail room solely for the purpose of inspecting for contraband but could not be read.¹¹⁹ Because of this possibility the court held that inmates were entitled to be present when the prison officials opened incoming mail from attorneys to inspect for contraband.¹²⁰

There are several justifications for allowing uncensored corre-

116. *Id.* at 395.

117. *Id.*

118. 328 F. Supp. 162 (D. Me. 1971), *aff'd*, 454 F.2d 696 (1st Cir. 1972).

119. The court noted: "[E]ven though the proposed regulations provide that incoming attorney mail shall not be read by the prison officials, the fact remains that they can still open such mail. It is evident . . . that if the opening occurs in the absence of the inmate, his attorney will still be reluctant to communicate fully with his client because of the fear that his correspondence will be read by others. The 'chilling effect' on the inmates' right to the effective assistance of counsel is apparent." *Id.* at 165.

120. *Id.* Other courts have protected the prisoner differently. In *Peoples v. Wainwright*, 325 F. Supp. 402, 403 (M.D. Fla. 1971), Florida State Prison officials were prohibited from opening the prisoner's mail to his attorney, subject to the qualification that such mail could undergo "whatever tests may be appropriate for security purposes." In *Freeley v. McGrath*, 314 F. Supp. 679 (S.D.N.Y. 1970), it was found that a prisoner's allegations that mail censorship regulations interfered with his attorney-client relationship raised a substantial federal question. The court suggested another method for facilitating uncensored correspondence between an attorney and an inmate: "Mail entitled to the confidentiality of the attorney-client relationship could be identified and differentiated in handling by having the attorney of record at the time of such correspondence file a copy of his notice of appearance with the warden or other official responsible for regulating the prisoner's mail." *Id.* at 680 n.1. In *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970), where the court ruled that outgoing letters could not be opened, read or inspected without a search warrant. *But see Sostre v. McGinnis*, 442 F.2d 178, 201 (2d Cir. 1971) (incoming and outgoing correspondence may be read); *Tyree v. Fitzpatrick*, 325 F. Supp. 554, 559 (D. Mass. 1971) (incoming and outgoing mail, including attorney-client correspondence, may be read but material cannot be deleted or excised).

spondence between prisoners and attorneys. First, when prison censors are able to make judgments as to what constitutes legitimate legal business, the long-standing tradition of confidence between attorneys and clients¹²¹ is breached. Not only do prison officials frequently lack the competence to determine where to draw the line separating legal from nonlegal transactions, but enforcement of strict censorship rules may make it almost impossible for a prisoner to register objections to the treatment he is receiving in prison.¹²² Furthermore, courts that give prison officials unbridled power to censor attorney-client letters presume that prison authorities are competent to judge the merits of claims that prisoners may seek to bring before a court through an attorney.

Second, the contention that some attorneys are not trustworthy enough to be allowed free correspondence with an inmate is not persuasive. For every unreliable member of the bar there are many times more who would abide by present ethical standards and rules that could be established to properly regulate inmate-attorney correspondence. If an inmate proposed in a letter some activity unrelated to the attorney-client relationship and inconsistent with the maintenance of prison security, the attorney rather than prison censors should judge its propriety. Just as canons of ethics operate in other areas to inhibit certain conduct by attorneys, published prison correspondence regulations, if reasonable, could govern relations between prisoners and their counsel. These regulations might delimit the bounds of acceptable attorney-client business and provide a procedure for establishing whether correspondents are actually members of the bar and how their letters can be verified.¹²³

Third, a probable argument that prison officials, including those in federal institutions where attorney-client mail is now visually scanned for contraband, would offer against this proposal is that un-

121. The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives and acts. 2 F. MECHAM, AGENCY § 2297, at 1877 (2d ed. 1914).

122. See, e.g., *Lee v. Tahash*, 352 F.2d 970, 974 (8th Cir. 1965), where the court upheld attorney-client mail censorship while emphasizing that a prison rule prohibited "criticizing the law, rules, institutional policy or officials." *Contra*, *Rhem v. McGrath*, 326 F. Supp. 681, 691 (S.D.N.Y. 1971), where the court said: "We think it only fair, particularly when an inmate has sued the Commissioner who holds him in custody, that the inmate be afforded a full opportunity to confer or correspond with his attorneys in privacy and without observation, interference, or listening in by representatives of the Commissioner, the adverse party."

123. See note 111 *supra*.

censored mail between attorneys and inmates would open the way for conspiratorial activity. But it should be pointed out that inmates presently have the right to consult privately with their attorneys within institutions as long as minimum requirements, such as reasonable visiting hours, are maintained.¹²⁴ Although visual surveillance of a prisoner's interview with his attorney is often required,¹²⁵ electronic eavesdropping is not allowed.¹²⁶ In modern-day correctional institutions, interviews are not generally conducted with glass walls separating participants. If censorship of mail is necessary, similar controls should certainly be required during private interviews, where it would be much easier for a corrupt attorney to furnish his client the necessary paraphernalia or information for perpetrating an escape or to provide drugs for maintaining an inmate's habit. Indeed, if an inmate is resolute, he will get his illegal message out of a prison through some other means of transmittal. Therefore, if an attorney can spend part of a day journeying to an institution to consult privately with his client about *any* matter, whether it is related to a pending appeal, personal problems, complaints, or business, it seems contradictory not to allow the same persons the right to correspond without restraint. As a dissenting judge remonstrated in *Brabson v. Wilkins*,¹²⁷ where the majority opinion limited communications between attorneys and inmates to matters only pertaining to the legality of the sender's detention and treatment,

[E]xactly how the exercise of this right [to free communication with counsel] will undermine prison discipline and authority is not made clear. . . . In any event, the right of a prisoner to unexpurgated communications with his attorney is so significant that it outweighs the danger of frustration of prison rules regarding outside activities in the rare case where an attorney—an officer of the court—would assist a prisoner in avoiding legitimate prison regulations.¹²⁸

Finally, it should be pointed out that the greatest burden of the censorship of letters between attorneys and inmates falls upon the poor pris-

124. See *In re Allison*, 66 Cal. 2d 282, 57 Cal. Rptr. 593, 425 P.2d 193, cert. denied, 389 U.S. 876 (1967).

125. Cf. *Konigsberg v. Ciccone*, 285 F. Supp. 585, 596-97 (W.D. Mo. 1968) (a prisoner was not denied any constitutional right when his portion of telephone conversations to his attorney were overheard). But see *Turner v. State*, 91 Tex. Cr. Rep. 627, 631, 241 S.W. 162, 164 (1922), where the court said: "The law contemplates a private and confidential communication between the attorney and client A communication ceases to be privileged when uttered in the presence of a third party. The insistence in the instant case that the sheriff be present amounts to a denial of the privilege guaranteed by the Constitution."

126. *State v. Cory*, 62 Wash. 2d 371, 382 P.2d 1019 (1963).

127. 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967).

128. *Id.* at 439, 227 N.E.2d at 386, 280 N.Y.S.2d at 565.

oner. Not many inmates have the financial resources to pay the significant expenses of having an attorney visit him at a distant penal institution. Since prisons are often located many miles from population centers where legal counsel may be available, a letter is usually the only way in which an inmate can contact, retain, and seek counsel from an attorney.

C. Mail Addressed to Officials

Courts have upheld prison regulations prohibiting the sending of letters to various public officials, office holders, and organizations including United States Supreme Court justices,¹²⁹ probation officers,¹³⁰ the Veteran's Administration,¹³¹ and a federal committee charged with studying problems of indigent defendants.¹³² In addition, it has been held there is no absolute right to correspond directly with a specific judge.¹³³ Most of these decisions have relied upon the "hands-off" doctrine in ruling that the function of the courts is not to interfere with the prerogative of prison authorities acting in the interests of orderly prison management.

Typical of the opinions expressing this viewpoint is *Belk v. Mitchell*.¹³⁴ There, a state prisoner's letter, written while in solitary confinement, was addressed to the superintendent of the North Carolina Department of Corrections. It was opened and read by prison officials, although it was later mailed in an unaltered form. The district court held that censorship of mail, whether addressed to the head of the state department of corrections or to others, is not a deprivation of any constitutional guarantee available to a state prisoner in solitary confinement. No substantial reasons were given for permitting the censoring of this letter other than the usual rationales that control of mail is necessary to proper prison administration and that the prisoner's letter did eventually reach its addressee.¹³⁵ In contrast, the court in the recent case of *Palmigiano v. Travisono*¹³⁶ ruled that state prison

129. *Barber v. Page*, 239 F. Supp. 265 (E.D. Okla. 1965).

130. *Pope v. Daggett*, 350 F.2d 296 (10th Cir. 1965).

131. *Goodchild v. Schmidt*, 279 F. Supp. 149 (E.D. Wis. 1968).

132. *United States ex rel. Thompson v. Fay*, 197 F. Supp. 855 (S.D.N.Y. 1961).

133. *Spires v. Dowd*, 271 F.2d 659 (7th Cir. 1959) (the prisoner did, however, have a right to mail legal documents to the clerk of a court).

134. 294 F. Supp. 800 (W.D.N.C. 1968). *But see* *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962) (District of Columbia prison officials prohibited from punishing a prisoner for making "false accusations" against the officials in a complaint to the District Commissioner).

135. *Id.* at 801-02.

136. 317 F. Supp. 776 (D.R.I. 1970).

administrators were not to open or inspect the contents of any incoming or outgoing letters between inmates and a lengthy list of federal and state public officials.¹³⁷

A letter to a state official is admittedly not a letter to a court or an attorney. But this is no reason why such communications, which often concern complaints about prison conditions or inquiries regarding legal matters, should be distinguished from those kinds of mail. In light of the purposes of general mail censorship, there is no significant difference between addressing one's grievances to a court or to a government agency, or state official, such as the head of the department of correction. It seems as unlikely that an inmate will discuss an escape plan or attempt to secure contraband with the latter as with the courts. If the purpose of allowing prisoners free access to the courts is to give them an opportunity to seek legal relief, there seems to be no reason to restrict their correspondence with public officials who are in positions to aid them. Although the traditional mode of seeking legal redress is through appeal to the judicial process, when certain public officials have the legal power to initiate individual redress of grievances or to scrutinize general prison conditions, differentiation between public officers or bodies and the courts seems illogical.¹³⁸

The reason behind the censoring of mail to public officials is the paranoia of prison administrators that these persons may become so disturbed about some prison condition or individual prisoner treatment that they will intervene in prison affairs. It is perhaps felt that there will be public misunderstanding of the purposes of some prison prac-

137. These included: The president of the United States, any United States senator or congressman, judges of any of the federal courts of the United States, the attorney general of the United States, the director of the Federal Bureau of Prisons, the governor of the State of Rhode Island, state officials and legislators, and state prison officials and members of the parole board. *Id.* at 788-789.

138. Speaking in a constitutional vein, two commentators have concluded: "Unfortunately, most courts have not yet recognized a prisoner's right to correspond with national organizations and public officials outside the judiciary. Nevertheless, there are at least three theories to support legal protection for these forms of freedom to communicate: First, the ability to complain to state and federal officials and possibly to the national media should be considered an inseparable part of the right to petition for the redress of grievances. Second, prison officials are public employees entrusted by the public with the responsibility for prison administration; they should not be able to interdict communications addressed to the legislature alleging abuse of that trust. Third, denial of the freedom to communicate serves no public interest and therefore would seem to be an arbitrary exercise of power prohibited by the due process clause of the fourteenth amendment." Hirschkop & Millemann, *supra* note 88, at 825-26 (footnotes omitted).

tices or policies. Thus, bringing any adverse state of affairs within the prison to the attention of the public may operate to the disadvantage of prison administrators seeking to run a "tight" institution.¹³⁹ Unless conditions in our prisons are given greater public exposure,¹⁴⁰ it seems doubtful they will ever accomplish the rehabilitative purposes for which many convicted criminals are sent to penal institutions.¹⁴¹

In the final analysis, truth is probably the best weapon for prison officials who believe prisoners are making unjust complaints concerning prison conditions. If criticism is directed to responsible public officials, prison administrators can respond and clear up any false or misleading allegations made by prisoners. Their fear of unjust criticism does not justify censorship when it is realized that they can always defend with the truth. The problem is, however, that inmates in all too many cases are telling the truth, and prison officials have a great deal to hide. This makes it imperative that outgoing inmate letters be uncensored—so as not to frustrate legitimate criticism.

V. Mail Censorship and Personal Contacts With The Outside World

To the inmates [isolated from the outside world], the physical restrictions symbolize the social-psychological gulf between themselves and the free community. The walls of the medieval fortress kept dangerous strangers out; the walls of this contemporary stronghold are intended to keep dangerous strangers in. Even when architectural design and stated philosophy oppose barriers against communication with the outside world, psychological isolation may be maintained through staff behavior implying attitudes that the inmate is unfit or somehow deficient simply because he has been confined . . . Imprisonment disconnects the inmate from the patterns of his life outside the walls. It interferes with vocational careers, marital relationships, recreational habits, and associations within the free community.¹⁴²

139. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

140. For examples of recent publicity over the Arkansas prison system see Murton, *One Year of Prison Reform*, *NATION*, Jan. 12, 1970 at 12; *Hell in Arkansas*, *TIME*, Feb. 9, 1968, at 74. See also *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

141. See generally Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967). One authority has stated: "[The] fact is well attested that imprisonment fails to produce any desirable readjustment, so far as the majority of prisoners are concerned. It is estimated that seventy to eighty percent of persons leaving prison are not reformed, but continue to commit offenses as serious as those for which they were committed, and usually within three to five years after release from prison." Slovenko, *Introduction to Part Eight—Corrections*, *CRIME, LAW AND CORRECTIONS* 568 (R. Slovenko ed. 1966).

142. E. JOHNSON, *CRIME, CORRECTION, AND SOCIETY* 497-98, 501 (rev. ed. 1968).

As previously noted, one of the principal obstacles preventing a prisoner's contact with the outside world is censorship rules which limit the number of letters that may be sent, restrict the addressees to a specific list of approved persons, and restrain an inmate from using certain types of language or making particular kinds of remarks in letters.¹⁴³ Not only do prison officials have a high degree of discretion to determine what outgoing mail is acceptable, but inmates have been made subject to disciplinary reprisals for criticizing prison conditions and personnel in correspondence.¹⁴⁴ The arguments for restricting personal contacts with the outside are the same as those we have already encountered: fear of correspondence being used to further business and political activities, concern over adverse effects upon rehabilitation, and interference with prison administration through the making of false or misleading statements in letters or through organizing escape plans. Censorship of incoming mail has been justified for similar reasons, although there has been more emphasis upon the protection of internal security through the screening out of inflammatory or controversial literature. There is probably greater justification for censorship of incoming mail, particularly packages, than for outgoing mail. However, censorship of incoming mail should be limited to inspection—not reading—except in cases in which there is evidence of an escape plot or other crimes. Through an analysis of some of the cases concerning nonofficial mail, an attempt will be made to determine whether the ends served by censorship rules regulating personal correspondence are justified by the reasons posited for their existence and the means employed to carry them out.

A. Correspondence Courses and Manuscripts

In *Numer v. Miller*¹⁴⁵ an inmate was refused permission to mail lesson sheets to the extension division of the University of California in connection with a correspondence course in English. The first assignment asked for the student's reasons for taking the course. The inmate claimed to have answered his assignment truthfully. His paper stated that he was taking the course because he intended upon his release to write a book exposing the prison authorities as "a sadistic group in charge of the brutality department."¹⁴⁶ The prisoner was told "he would not be allowed to proceed with the course unless he changed his

143. See notes 66-74 & accompanying text *supra*.

144. Hirschkop & Millemann, *supra* note 88, at 823.

145. 165 F.2d 986 (9th Cir. 1948).

146. *Id.* at 986.

tactics.”¹⁴⁷ The court disposed of the case by treating the refusal as a legitimate disciplinary measure. Similar decisions have upheld the refusal of prison officials to allow inmates to take correspondence courses from certain religious colleges.¹⁴⁸

Courts have held that prison officials may refuse to mail an inmate's business letter on the ground that it is too vague,¹⁴⁹ and have forbidden prisoners entirely from engaging in business correspondence.¹⁵⁰ One type of case which has attracted much publicity concerns the writing and publishing of prisoner manuscripts.¹⁵¹ In *Stroud v. Swope*¹⁵² the well-known “Birdman of Alcatraz” sought an injunction against the warden of Alcatraz to prevent interference with efforts to secure publication of a book he had been writing and with his general business correspondence. The Ninth Circuit dismissed his petition, holding that the function of the courts was not to superintend the discipline and treatment of inmates. Another case involved a prisoner who was on death row for nine years. A state statute provided for correspondence with the prisoner's lawyer, doctor, minister and close relatives, and the court in *Labat v. McKeithen*¹⁵³ denied an injunction against the refusal by prison authorities to permit correspondence with anyone with whom access was not specifically provided to a condemned prisoner by the statute.

The argument can be made that in the case of correspondence courses or the writing of manuscripts there is a beneficial rehabilitative effect upon prisoners that outweighs the interests of prison administrators in keeping order or controlling inmates' activities. Not only

147. *Id.*

148. *Diehl v. Wainwright*, 419 F.2d 1309, 1310 (5th Cir. 1970), where the court stated that “[t]he taking of a correspondence course by a prisoner, just as the control of his other actions, is subject to regulation for penal institutional purposes, and he cannot dictate either the time, the preoccupation or any other condition which he desires for the pursuit of it.” *Accord*, *Kelly v. Dowd*, 140 F.2d 81 (7th Cir.), *cert. denied*, 320 U.S. 783 (1944).

149. *Krupnick v. Crouse*, 366 F.2d 851 (10th Cir. 1966).

150. *See Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949).

151. *E.g.*, *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970) (inmate could correspond with civil liberties union as long as correspondence was in accordance with prison security rules); *Maas v. United States*, 371 F.2d 348 (D.C. Cir. 1966) (preliminary injunction issued prohibiting publication of a prisoner's written manuscript); *Berrigan v. Norton*, 451 F.2d 790 (2d Cir. 1971) (federal prison regulation governing the preparation and dissemination of inmate's writings for publication outside prison challenged but not specifically overruled because prisoner's sermon not submitted to officials for publication).

152. 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951).

153. 361 F.2d 757 (5th Cir. 1966).

do both activities provide opportunities for improvement of important verbal skills, but they provide a socially acceptable outlet for inner frustrations.¹⁵⁴ Whether the inmate is taking a correspondence course to enrich his educational background or writing a manuscript to pass the time, both avocations supply important diversions away from the tedium of prison life. Furthermore, any education an inmate receives in prison will probably prove valuable when he searches for employment upon release. The most vital consideration, however, is that intellectual activities help keep an inmate's mind acute and enable him to kindle a feeling of self-esteem in an environment which deprives him of individuality and normal outlets of expression.¹⁵⁵ Without reasonable alternatives to the boredom of incarceration one must ask how an inmate is expected to rehabilitate himself. Of course, organized prison vocational and recreational activities contribute to the rehabilitative process, but these programs are not always available nor is there much evidence indicating that they actually furnish the requisite possibilities for an inmate to find redirection. Writing about one's past criminal life or experiences in prison, whether or not the opinions expressed are critical of prison administration, can give an inmate a chance to evaluate his past behavior in a critical light and to release hostilities against his captors in a manner consistent with the goal of finding alternatives to antisocial conduct. There are also benefits which accrue to the outside society from the writings of inmates. As Edgar Smith, a convicted murderer and author of two novels that detail murder and the intricacies of the law, has poignantly noted:

I felt I had a unique opportunity, based upon my experience, to give the reading public an inside view of the weaknesses and deficiencies of our archaic judicial processes, of how the system is programmed to compromise, how breakdowns can occur, when the system . . . and those in it, are graded like a football team, with the won and lost record the measure of success. That is the

154. One might postulate that the same arguments should apply to letters to magazines or newspapers, so long as the content would not present a danger of internal prison disruption. *But see* McDonough v. Director of Patuxent, 429 F.2d 1189 (4th Cir. 1970) (inmate's letter to national periodical prohibited); Theriault v. Blackwell, 437 F.2d 76 (5th Cir. 1971) (court refused to intervene when prisoner's letter to a newspaper was destroyed).

155. This search for creative release within the rehabilitative process has been described as follows:

"Thus, serious attempts would have to be made to discover [an inmate's] special abilities, and having made such discovery, opportunity would have to be extended to him for self-expression along these lines. Only in this manner can he be endowed with the sense of personal worth and significance necessary to rebuild his ego shocked into rebellion by incarceration." Floch, *Are Prisons Outdated?* in *PENOLOGY* 10, 18 (C. Vedder & B. Kay ed. 1964).

real story I wanted to tell. The apparent story, the story of the crime, was merely a vehicle to take the reader behind the headlines. I could have written a law journal piece, "A Death House View of the Internal Workings of the American Judicial System"; but who would have read it?¹⁵⁶

One might predict a vociferous hue and cry would be raised by prison officials confronted with the enforcement of regulations allowing most educational correspondence courses to be sent in and prisoner writings to be sent out. One must concede there are minimum standards for the maintenance of order within prisons. Nevertheless, until the volume of correspondence relating to educational courses and business transactions with publishers is very great, one cannot envision administrative problems of a more significant magnitude than are presently encountered. Screening procedures similar to those now employed in federal prisons to keep out contraband could be utilized in this area. If prison officials are worried about inmates using the mails to conduct businesses, any substantial profits could be held on an inmate's account or given to his family. Finally, a realistic view must concede that few inmates are likely to take advantage of the new found privilege to write their life story, and where rules have been relaxed to permit such writing, a resulting decrease in prison discipline has not occurred.¹⁵⁷ In sum, unless prison officials can demonstrate that allowing inmates freedom to take correspondence courses or send out uncensored manuscripts will substantially disrupt prison discipline, inmates should be allowed these privileges freely.

B. Periodicals, Law Books and Newspapers

Another controversial subject in the area of mail censorship is the exclusion of periodicals thought to be "inflammatory."¹⁵⁸ Partic-

156. Lingeran, *From the Pen of Edgar Smith*, N.Y. Times Book Review, Dec. 13, 1970, at 10, col. 5. See also G. JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970); E. CLEAVER, SOUL ON ICE (1968). For a list of famous books that have been written by prisoners, such as John Bunyan's *Pilgrims' Progress* and Oscar Wilde's, *Ballad of Reading Goal*, see B. TETTERS, NEW HORIZONS IN CRIMINOLOGY 517-19 (3d ed. 1959).

157. There may be some advantages to being an imprisoned novelist. Edgar Smith has written, "I don't advocate anyone getting himself sentenced to death so he can have privacy, but at times the isolation is an advantage. When I need to be alone to concentrate on a writing problem, I don't have to turn off the TV, cancel the newspapers, disconnect the phone, disassociate myself from family and friends, or go off to a writer's colony. I just hang a 'Leave me Alone' sign on my bars." Lingeran, *From the Pen of Edgar Smith*, N.Y. Times Book Review, Dec. 13, 1970, at 10, col. 4.

158. *Abernathy v. Cunningham*, 393 F.2d 775, 778-79 (4th Cir. 1968) (refusal of prison to admit Black Muslim publication upheld); *Desmond v. Blackwell*, 235 F.

ular problems have arisen concerning the publications of the Black Muslims.¹⁵⁹ Less than ten years ago many prison officials refused to take seriously the protestations of Muslims that denial of their right to practice Muslim rites and have Muslim publications in prison was discriminatory. Thus, one prison official stated that:

A group of inmates has been claiming adherence to a religious belief, one with which the members had obviously not been identified prior to their confinement. The cult, which has been springing up in various correctional institutions, has no apparent bona-fide affiliation with the time-honored and respected mother church of the religion [W]e may reasonably assume that these cult members are merely making another attempt to harass prison administrators and officials.¹⁶⁰

Several courts agreed with this sentiment. When Black Muslims sought a writ of mandamus for relief against interference by prison administrators with their right to receive Muslim publications, the court in *Long v. Katzenbach*¹⁶¹ found that the prison administrators were fully justified in not permitting the inmates to correspond with Elijah Muhammad, the patriarch of their religion.

The plaintiffs complain they cannot receive the weekly newspaper, "Muhammad Speaks." This is highly inflammatory material and any such refusal is justified. . . . The only other specific book that was denied is "The Message to the Blackman" by Elijah Muhammad. Long was denied this book. There is nothing to indicate that this is legitimate Islamic literature or that the right of censorship was abused. There is no evidence that any legitimate request has been refused.¹⁶²

Even where courts have found Muslim publications not to be inflammatory and likely to cause disruption, they have vindicated censorship upon the administrative rationale that screening all other publications, if Muslim periodicals were permitted, would be too difficult.¹⁶³

Supp. 246, 249 (M.D. Pa. 1964) (refusal of prison to admit Black Muslim publication upheld).

159. *Knuckles v. Prasse*, 435 F.2d 1255 (3d Cir. 1970); *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Abernathy v. Cunningham*, 393 F.2d 775 (4th Cir. 1968); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967); *Fulwood v. Alexander*, 267 F. Supp. 92 (M.D. Pa. 1967); *Desmond v. Blackwell*, 235 F. Supp. 246 (M.D. Pa. 1964); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962); See generally Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962).

160. E. Urbaniak, *Rights of Prisoners in Confinement*, 8 CRIME & DELINQUENCY 121, 122-23 (1962).

161. 258 F. Supp. 89 (M.D. Pa. 1966).

162. *Id.* at 93; accord, *Knuckles v. Prasse*, 435 F.2d 1255, 1256 (3d Cir. 1970).

163. See *Desmond v. Blackwell*, 235 F. Supp. 246, 249 n.5 (M.D. Pa. 1964), where petitioner introduced in evidence an issue of "Muhammad Speaks" which was found

Neither the arguments concerning potential disruption nor the practical administrative difficulties involved in censoring all incoming publications seem convincing. A more sensible approach was undertaken in *Banks v. Havener*¹⁶⁴ where the court refused to accept the hypothetical disruption arguments and looked behind the stated reasons for the censorship requirements. The court held that prison officials must prove the availability of the newspaper *Muhammad Speaks* creates a clear and present danger of a breach of prison security or discipline¹⁶⁵ before prohibiting it. The court's analysis in *Banks* is strengthened by the fact that the stoppage of Muslim publications was instituted during the period of a prison riot. The court specifically found that there was no conclusive evidence that the Muslim literature had been the source of the riot and the publications had been permitted during other times without administrative inconvenience.

More recently, in *Sostre v. Otis*¹⁶⁶ a New York state prisoner was denied access to a number of Black Muslim, black nationalist and left-wing publications to which he had subscribed.¹⁶⁷ This action was taken by prison administrators despite a department of corrections ruling that specifically provided that "inmates shall be allowed to subscribe to or to receive from authorized correspondents a wide range of books, magazines and newspapers."¹⁶⁸ Nevertheless, receipt of publications was subject to approval by a review committee. While accepting the premise that certain literature may pose such a clear and present danger to the security of a prison, or to the rehabilitation of prisoners,

"not as inflammatory as the others," but the court felt that it "would be unreasonable to require the censorship to include the reading of every page of every magazine coming into the institution for approximately 1646 prisoners."

164. 234 F. Supp. 27 (E.D. Va. 1964).

165. *Id.* at 30; *accord*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (*Muhammad Speaks*); Long v. Parker, 390 F.2d 816 (3d Cir. 1968) (*Muhammad Speaks*); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970) (*Muhammad Speaks* and *The Holy Qu-ran*). See also Long v. Parker, 390 F.2d 816 (3d Cir. 1968), where the court stated that "[m]ere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison; nor does the mere speculation that . . . riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution." *Id.* at 822.

166. 330 F. Supp. 941 (S.D.N.Y. 1971).

167. The list of publications included: *Muhammad Speaks*, *Liberator Magazine*, *Afro-America*, *Negro Digest*, *Criminal Law Bulletin*, *The Buffalo Challenger*, *Workers World*, *Martin Sostre in Court*, *Selected Writings of Mao Tse Tung*, and *The Handbook of Revolutionary Warfare*. *Id.* at 942.

168. *Id.* at 943.

that it should be censored,¹⁶⁹ the court was still loathe to find that

an individual's right to read such literature as he chooses, provided no substantial danger of disruption is presented, is expressly or impliedly lost upon his incarceration . . . or that this right is any less significant than the right to be free from arbitrary, capricious, or unwarranted punishment.¹⁷⁰

Once again, the benefits of inmate contact with the outside world and the possibilities for reform through religious study¹⁷¹ would seem to outweigh the pleas of prison administrators. Allowing some publications expressing viewpoints with which administrators might disagree will not bring ruin to the orderly system they have heretofore maintained without judicial scrutiny. Unless prison administrators can come forward with empirical evidence that certain publications have *actually* caused disruption or seriously impaired prison management, courts should strike down censorship requirements that serve no reasonable purpose.

Courts have also dealt with censorship regulations prohibiting law books,¹⁷² certain newspapers,¹⁷³ and periodicals¹⁷⁴ from entering penal institutions. Restrictions on the ordering of law books seem inexcusable. Given the difficulty which inmates have in retaining and paying counsel,¹⁷⁵ self-representation remains the only realistic way for

169. The court pointed out that: "Some censorship or prior restraint on inflammatory literature sent into prisons is, therefore, necessary to prevent such literature from being used to cause disruption or violence within the prison. It may well be that in some prisons where the prisoner's flash-point is low, articles regarding bombing, prison riots, or the like, which would be harmless when sold on the corner newsstand, would be too dangerous for release to the prison population." *Id.* at 945.

170. *Id.*; accord, *Owens v. Brierley*, 452 F.2d 640 (3d Cir. 1971) (violation of prisoner's constitutional rights to refuse to allow subscription to *Sepia*).

171. See generally *THE AUTOBIOGRAPHY OF MALCOLM X* (1964).

172. *E.g.*, *United States ex rel. Wakeley v. Pennsylvania*, 247 F. Supp. 7 (E.D. Pa. 1965); *Grove v. Smyth*, 169 F. Supp. 852 (E.D. Va. 1958). *Contra*, *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

173. *E.g.*, *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969) (religious newspaper); *United States ex rel. Oakes v. Taylor*, 274 F. Supp. 42 (E.D. Pa. 1967) (out of state newspaper). *Contra*, *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968) (black newspapers and magazines); *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966) (black newspaper).

174. *E.g.*, *Payne v. Whitmore*, 325 F. Supp. 1191 (N.D. Cal. 1971); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

175. See *Larsen, A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 345 (1968): "Lawyers generally require at least a fifty dollar fee to travel to the prisons to consult with a prisoner. The ones not able to pay this sum must resort to the next best course of action—act as their own lawyers. . . . Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner

most prisoners to get into court.¹⁷⁶ Ever since the Supreme Court's decision in *Johnson v. Avery*¹⁷⁷ that a prison rule banning "jailhouse lawyers" denied prisoners access to the courts, more inmates will be preparing their own legal documents. Such work naturally requires access to legal materials, but prison libraries have been notoriously inadequate in providing the needed types and numbers of legal texts and services.¹⁷⁸ Therefore, *Avery* is inconsistent with cases upholding prison regulations limiting the amount of time a prisoner may spend in the prison library,¹⁷⁹ the number and types of books a prisoner may purchase for himself,¹⁸⁰ the use and storage of books in prisoners' cells,¹⁸¹ and the sources from which books may be purchased.¹⁸² If prisoners are truly to have a right of free access to court, the opportunity to secure law books and legal materials without censorship restrictions is imperative.¹⁸³

The difficulties inherent in granting prison officials wide discretionary power to determine the periodicals and public information literature inmates may receive was dramatized in an action¹⁸⁴ brought on behalf of two state prisoners by the Fortune Society, a nonprofit organization whose primary purpose is creating greater public awareness of the prison system in America. Prison officials had denied the inmates permission to receive the Fortune Society's newsletter. This newsletter, which contains articles and information on prison reform, ex-convicts' rehabilitation and the activities of the organization, is

discovers what a lawyer could have told him in several weeks—that his case either has or lacks merit."

176. See generally Jacob & Sharma, *Justice After Trial: Prisoner's Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493 (1970).

177. 393 U.S. 483 (1968).

178. See *Gilmore v. Lynch*, 319 F. Supp. 105, 107-08 n.4 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

179. *Hatfield v. Bailleaux*, 290 F.2d 632, 640-41 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

180. *Walker v. Pate*, 356 F.2d 502 (7th Cir. 1966); *In re Harrell*, 2 Cal. 3d 675, 420 P.2d 640, 87 Cal. Rptr. 504 (1970).

181. *Carey v. Settle*, 351 F.2d 483 (8th Cir. 1965); see *United States ex rel. Lee v. Illinois*, 343 F.2d 120 (7th Cir. 1965) (right to store personal letters).

182. *Lockhart v. Prasse*, 250 F. Supp. 529 (E.D. Pa. 1965) (books may be purchased only directly from publishers); cf. *United States ex rel. Wakeley v. Pennsylvania*, 247 F. Supp. 7 (E.D. Pa. 1965) (access to books limited to three specified sources).

183. The Supreme Court has recently upheld a decision of a three judge federal court requiring that prisons provide inmates with an adequate law library. *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

184. 319 F. Supp. at 902.

widely distributed and read by inmates throughout the country.¹⁸⁵ It was banned in New York State correctional institutions, however, because the deputy commissioner of corrections felt that the newsletter and various Fortune Society speakers, including ex-inmates, were not reflecting the truth concerning conditions in the state prison facilities.¹⁸⁶ Finding the prison officials' fear of criticism to be outweighed by a First Amendment right to receive the publication, the court issued an injunction against continued restriction. Judge Weinfeld reasoned that in order to justify the prohibition of the newspaper prison officials would have to demonstrate a clear and present danger to prison discipline or security.¹⁸⁷ In dicta, he presented a compelling statement on the right of inmates to receive publications critical of prison authorities.

Prison administration has been the subject of deep concern in contemporary society. Citizens, public groups and officials, as well as inmates, have been sharply critical of our correctional and penal practices and procedures. Various sectors of the community have charged correctional and prison administrators, and the courts as well, for administrative deficiencies and policies. Whether justified or not, prime responsibility for these alleged shortcomings have been attributed by many, including newspapers, to the courts and prison administrators. However distasteful or annoyed or sensitive those criticized may be by what they consider unfair criticism, half truths or information, it does not justify a ban of the publication carrying the alleged offending comments. *Censorship is utterly foreign to our way of life; it smacks of dictatorship. Correctional and prison authorities, no less than the courts, are not above criticism, and certainly they possess no power of censorship simply because they have the power of prison discipline.*¹⁸⁸

If this advice is followed, prison authorities in the future may have to supply better reasons for their actions than a mere apprehension that certain publications may be "bad." Perhaps some administrators have just cause to fear publications such as the Fortune News threaten their positions of power within penal institutions.¹⁸⁹ As inmates become

185. *Id.*

186. *Id.* at 903.

187. *Id.* at 905. The court relied upon the Black Muslim freedom of religion cases, which are discussed at notes 158-71 & accompanying text *supra*.

188. *Id.* (footnotes omitted) (emphasis added).

189. Besides the considerations of possible disruptions asserted by prison administrators as reasons for excluding certain publications, see footnotes 157-71 *supra* & accompanying text, certain more practical reasons have been set forth. These include the possibilities that: (1) such materials would be used by inmates to start fires; (2) such materials might also be used to plug toilets and drains in the prison and jail facilities; (3) inmates might quarrel over each other's newspapers and magazines; and (4) it would be costly for jail personnel to process inmate subscriptions. *Payne v. Whitmore*, 325 F. Supp. 1191, 1192-93 (N.D. Cal. 1971). In *Payne*, the court considered these explanations for censorship regulations and found them inadequate to

aware that someone on the outside cares about their treatment and is concerned about their chances for rehabilitation within the forbidding gray walls, prison administrators may have to change their practices. The history of American penal institutions is replete with well-meaning reformers who attempt to effect change through traditional rehabilitative techniques such as vocational, educational, and psychiatric programs. But the revolving door, as indicated by the continually high recidivism rates, keeps swinging. It appears to some that all the altruistically motivated rehabilitation programs are far overshadowed by the detrimental effects generated by the oppressive environment of captivity.¹⁰⁰ By creating more bridges between inmates and society through unhindered access to the ideas expressed in periodicals such as *Fortune News*, prisoners will be able to see some light at the end of the long tunnel of their confinement.

Inmates have experienced as much difficulty corresponding with outside magazines and newspapers as they have had getting various periodicals through the censors into prisons. For instance, in *McDonough v. Director of Patuxent*¹⁹¹ an inmate sought to correspond with *Playboy* magazine in order to obtain psychiatric, financial, and legal assistance for a redetermination hearing regarding his status as a defective delinquent. Arguing in support of their refusal to mail his letters, prison officials stated that the purpose of the correspondence was to criticize the state's defective delinquent law and its implementation at the institution. This, they claimed, would have had a deleterious effect upon institutional control and discipline.¹⁹² The court concluded that if this claim were true then administrators possessed the power to suppress such publication since

publication in a national magazine [would] adversely affect institutional control and discipline because of the apparent defiance and critical attitude of one of its inmates—word of which would surely reenter the institution and reach other inmates . . . [and affect forthcoming redetermination hearings].¹⁹³

sustain unreasonable rules barring certain jail inmates from "receiving by subscription, purchase, or gift, newspapers, magazines, or similar periodicals, and reading them at such times and in such places as may be reasonably deemed consonant with jail routine." *Id.* at 1193.

190. The correctional problem has been summarized as follows: "Prisons, as now constructed and operated, simply do not rehabilitate. There are a very few individuals, I think, who are rehabilitated in prison; never, I believe, are they rehabilitated by prison. On the contrary, they are rehabilitated in spite of prison." Leopold, *What is Wrong with The Prison System?*, 45 NEB. L. REV. 33, 42 (1966).

191. 429 F.2d 1189 (4th Cir. 1970).

192. *Id.* at 1192.

193. *Id.* at 1193.

Thus, ultimate discretion to determine what types of possible inmate criticism might cause threats to prison security was left in the hands of prison administrators.

The power of prison censors to silence critical voices from inside the prison walls was again tested in the First Circuit's recent decision in *Nolan v. Fitzpatrick*,¹⁹⁴ where the issue was whether an inmate could be denied the right to send a letter to a newspaper expressing his complaints.¹⁹⁵ Two rationales were posited by prison authorities attempting to prevent an inmate from writing a "letter to the editor." First, such letters were alleged to present a security risk because inflammatory comments by inmates would eventually find their way back into the prison with resulting strikes or riots by prisoners. The court answered this charge by pointing out that inmates were already entitled to receive newspapers critical of prison authorities. It continued its reply by stating that:

If it be thought that the effect of criticism from within the prison is likely to be greater than that of criticism by outsiders, the short answer is that prisoners are quite well able to proselytize directly.¹⁹⁶

Second, the court branded as a "dubious assumption" the allegation that newsmen would participate in escape attempts or assist in transferring contraband from one prisoner to another.¹⁹⁷ This was particularly strengthened by the fact that in the instant case the complaining inmate had not contested prison regulations allowing censors to read letters addressed to newspapers. Finally, the court relied upon the penetrating observation that:

[T]he condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear.¹⁹⁸

In sum, apparently not all courts are willing to bow automatically to the warnings of possible breaches of security made by prison administrators worried about internal discipline.¹⁹⁹ Judges, as many members

194. 451 F.2d 545 (1st Cir. 1971).

195. *Cf. Burnham v. Oswald*, F.2d , 10 Crim. L. Rptr. 2187 (2d Cir. Nov. 15, 1971) (news media representatives may interview Attica prison inmates following prison rebellion).

196. 451 F.2d at 549.

197. *Id.*

198. *Id.* at 547-48.

199. *Cf. Statement of Federal Bureau of Prisons Director Norman A. Carlson*,

of the public, are beginning to realize that simply gagging prisoners will not prevent outbreaks of violence within prisons. Maybe the real prospects for change will be realized only when the public has a greater awareness of what happens to prisoners after the prison doors close shut isolating them from society.

VI. Conclusion

Recent decisions have given hope that the courts are beginning to abandon the "hands-off" doctrine and venture into the judicially unknown and uncharted world of prisoners' rights and prison censorship of inmate mail. An outstanding example of this developing trend is District Judge Mansfield's decision in *Carothers v. Follette*.²⁰⁰ In that case the court ruled that prison officials could not read mail addressed to the courts, discipline an inmate for legal correspondence addressed to the courts or his attorney, or impose punishment because of statements made in letters written to persons outside the prison walls unless such correspondence presented a clear and present danger of disrupting prison security or some other justifiable purpose of imprisonment.²⁰¹ In reaching its conclusion that the inmate in question could not be placed in solitary confinement and have good time forfeited for statements made in a letter to his parents, the court said:

[There is no] indication that plaintiff's comments intended for his parents would retard his rehabilitation, unless that word is defined as abject acceptance of all prison conditions, however unjustifiable. [W]e doubt whether preparation of a prisoner for return to civilian life is advanced by deadening his initiative and concern for events within the prison itself. . . . Correspondence with outsiders, particularly members of the family, would appear to be an obvious aid in fostering these interests. Carping of the sort expressed in plaintiff's letter seems an understandable reaction by a man who feels wronged, as plaintiff did when he was sent to solitary. Furthermore, such comments, even if they momentarily cause chagrin to prison officials, may act as a form of healthy catharsis in the case of an introvert. The action of prison officials in finding that such statements, uncommunicated to other prisoners, constituted an offense, strikes us as an unjustifiable overreaction.²⁰²

who has recently announced that letters to newsmen from federal prisoners will henceforth be forwarded "directly, promptly, sealed and without inspection." Incoming correspondence from the news media will be inspected solely for contraband, or for content which would incite conduct which is illegal. N.Y. Times, Feb. 11, 1972, at 10, col. 1.

200. 314 F. Supp. 1014 (S.D.N.Y. 1970).

201. *Id.* at 1030.

202. *Id.* at 1025-26 (footnotes omitted).

Thus, courts are starting to realize that if prison regulations are designed to teach prisoners to live in conformity with the norms of society, then sporadic and discretionary enforcement of them is more likely to breed contempt of the law than respect and obedience.²⁰³ The arbitrary treatment received by inmates may discourage them from cooperating in rehabilitation rather than preparing them to be functional members of society. The only purpose that such treatment can serve is the self-gratification of guards wishing to maintain superiority over inmates.

Indeed, as another court has indicated:

Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erode the very foundations upon which he can prepare for a socially useful life.²⁰⁴

In some ways analogous to a ghetto-dweller, an inmate is restricted in a confined area and tensions and problems build up within him. Unlike the ghetto-dweller, however, there seems no possible way to escape. He is forgotten. Society seldom helps him to find a purposeful function in the outside world from which he has been outlawed. Once the gates close behind him, he is left with few safety valves or emotion-releasing outlets to let off tensions or to express his feelings.²⁰⁵

Freer access to the outside world through the mails can begin to provide an inmate with opportunities to let off hostility towards prison life. In addition, it can prepare him for eventual release by keeping personal contacts alive and allowing him to keep pace with events in a rapidly changing world. Certainly, there must be some prison regulation of these contacts in order to maintain discipline within the institu-

203. See *Jackson v. Godwin*, 400 F.2d 529, 535 (5th Cir. 1968). See also California Correctional System Study, Prison Task Force Report 40 (1971). This study found that full and complete censorship of mail, which is presently employed at various California institutions, is unnecessary and recommended that it should be abandoned in favor of a spot-type censorship or some other modified form. The Report's recommendation states that: "There is no clear relationship between the type of institution and the degree of censorship. This seems unnecessary. The rationale that the outgoing mail is read by night shift officers and therefore is not an inconvenience is hardly a defense for the practice. It is senseless to do pointless things. If an inmate wishes to convey an illicit message to a correspondent, he will not normally put it in an outgoing letter which is to be read, but will find other means. Incoming mail must be opened and examined for contraband, of course, for the security of the institution, but the practice of reading everything that goes in and out is unnecessary and wasteful, and fosters inmate resentment."

204. *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. 1969).

205. See *Knuckles v. Prasse*, 302 F. Supp. 1036, 1057 n.16 (E.D. Pa. 1969) (doctor's testimony concerning prison life).

tion. But what standards prison administrators must apply to keep order has not yet been established. Many prison officials probably once thought that when prisoners no longer wore striped uniforms and marched in lock-step²⁰⁶ the penal system would collapse. Conceivably some prison administrators would react in a similar manner to rules allowing inmates unrestricted correspondence with courts, attorneys and private persons. At what point these administrators would throw up their hands and cry "Enough—I quit" is difficult to predict. But if prison administrators do not begin to come forward with some clear, fair standards concerning communications with the outside world, the trend of recent opinions seems to indicate the courts will undertake this task for them.

206. See Jacob, *supra* note 37, at 236.

